

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In re Applications of )  
 )  
VOICESTREAM WIRELESS )  
CORPORATION, )  
 )  
POWERTEL, INC., )  
 )  
Transferors, )  
 )  
and )  
 )  
DEUTSCHE TELEKOM AG, ) IB Docket No. 00-187  
 )  
Transferee, )  
 )  
for Consent to Transfer )  
Control of Licenses and Authorizations )  
Pursuant to Sections 214 and 310(d) of the )  
Communications Act and )  
Petition for Declaratory Ruling )  
Pursuant to Section 310 of the Communications Act )  
  
and  
  
POWERTEL, INC., )  
 )  
Transferor, )  
 )  
and )  
 )  
VOICESTREAM WIRELESS )  
CORPORATION, )  
 )  
Transferee, ) IB Docket No. 00-187  
 )  
 )  
for Consent to Transfer )  
Control of Licenses and Authorizations )  
Pursuant to Sections 214 and 310(d) of the )  
Communications Act )  
  
and

ELISKA WIRELESS VENTURES LICENSE )  
 SUBSIDIARY I, L.L.C., WIRELESS ALLIANCE )  
 L.L.C., COOK INLET/VS GSM IV PCS, LLC and )  
 COOK INLET/VS GSM V PCS, LLC )  
 ) IB Docket No. 00-187  
 Petitions for Declaratory Ruling Pursuant to Section )  
 310(b)(4) of the Communications Act )  
 )  
 and

IOWA WIRELESS SERVICES HOLDING )  
 CORPORATION, )  
*et al.* )  
 )  
 Petition for a Declaratory Ruling Pursuant to Section )  
 310(b)(4) of the Act, and for a Ruling that the )  
 Transfer of a Minority Ownership Interest in the ) IB Docket No. 00-187  
 Licensee does not constitute a transfer of control )  
 under Section 310(d) )  
 )

### MEMORANDUM OPINION AND ORDER

**Adopted:** April 24, 2001

**Released:** April 27, 2001

By the Commission: Commissioner Furchtgott-Roth approving in part, dissenting in part, and issuing  
 a statement.

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APPENDIX A: Commenters and Filings

APPENDIX B: DT–VoiceStream/DOJ/FBI Agreement

**I. INTRODUCTION AND BACKGROUND**

1. In this Order, we consider the joint applications filed by Deutsche Telekom AG (DT), VoiceStream Wireless Corporation (VoiceStream), and Powertel, Inc. (Powertel) (collectively, Applicants), pursuant to sections 214(a) and 310(d) of the Communications Act of 1934, as amended (Communications Act or Act),<sup>1</sup> for authority to transfer control of licenses and authorizations held by VoiceStream and Powertel to DT in connection with their proposed merger.<sup>2</sup> We conclude that approval of the applications to transfer control is in the public interest, subject to the conditions specified herein. We grant the petition filed by the U.S. Department of Justice and the Federal Bureau of Investigation to condition grant of the applications on the Applicants' compliance with their joint agreement regarding foreign ownership and national security issues. We also grant, to the extent specified herein, the petitions for declaratory ruling pursuant to section 310(b)(4) of the Act filed by VoiceStream and Powertel and find that the public interest

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<sup>1</sup> 47 U.S.C. §§ 214(a), 310(d).

<sup>2</sup> *VoiceStream Wireless Corp. and Deutsche Telekom AG*, Application for Transfer of Control and Petition for Declaratory Ruling, IB Docket No. 00-187 (filed Sept. 18, 2000) (VoiceStream DT Application); *Powertel, Inc. and Deutsche Telekom AG*, Application for Transfer of Control and Petition for Declaratory Ruling, IB Docket No. 00-187 (filed Sept. 18, 2000) (Powertel DT Application).

would not be served by denying the proposed indirect foreign ownership of VoiceStream and Powertel by DT in excess of 25 percent.

2. We also grant, to the extent specified herein, four separate petitions for declaratory ruling pursuant to section 310(b)(4), allowing indirect foreign ownership resulting from the VoiceStream DT proposed merger, filed by the following entities: (i) Cook Inlet/VS GSM IV PCS, L.L.C., and Cook Inlet/VS GSM V PCS, L.L.C. (CIVS IV and CIVS V); (ii) Wireless Alliance, L.L.C.; (iii) Iowa Wireless Services Holding Corporation; and (iv) Eliska Wireless Ventures License Subsidiary I, L.L.C.<sup>3</sup>

3. In the event that the merger of VoiceStream and DT is not consummated, we grant in the alternative Powertel's application to transfer control of licenses and authorizations it holds to VoiceStream, as discussed further herein.<sup>4</sup>

#### **A. The Applicants**

##### **1. VoiceStream Wireless Corporation**

4. VoiceStream is a publicly-traded Delaware corporation, headquartered in Bellevue, Washington.<sup>5</sup> VoiceStream operates personal communications service (PCS) systems throughout much of the United States, using the global system for mobile communications (GSM) standard.<sup>6</sup> VoiceStream subsidiaries are also licensed to operate point-to-point microwave, local multipoint distribution service (LMDS), wireless communications service (WCS), and specialized mobile radio (SMR) systems in various markets in the United States.<sup>7</sup>

5. In the first half of 2000, VoiceStream acquired two other GSM-based PCS operators, Omnipoint Corporation and Aerial Communications, Inc., making VoiceStream the eighth-largest mobile telephony operator in the United States in terms of subscribership.<sup>8</sup> In addition, VoiceStream recently

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<sup>3</sup> See Five Entities Seek Declaratory Ruling Pursuant to Section 310(b)(4) Allowing Indirect Foreign Ownership Resulting From the Proposed Acquisition of VoiceStream Wireless Corporation by Deutsche Telekom AG, and Iowa Wireless Seeks Declaratory Ruling Pursuant to Section 310(d), IB Docket No. 00-187, Public Notice, DA 01-280 (rel. Feb. 1, 2001) (Declaratory Ruling Public Notice).

<sup>4</sup> *VoiceStream Wireless Corp. and Powertel, Inc.*, Application for Transfer of Control, IB Docket No. 00-187 (filed Sept. 18, 2000) (VoiceStream Powertel Application).

<sup>5</sup> VoiceStream DT Application at 3. VoiceStream previously was a subsidiary of Western Wireless Corporation, but was spun off in its entirety to shareholders of that company on May 3, 1999. VoiceStream DT Application at 4.

<sup>6</sup> *Id.* at 4.

<sup>7</sup> *Id.* at 3-4.

<sup>8</sup> *Id.* at 5. VoiceStream (including Omnipoint and Aerial) ranked eighth behind Verizon Wireless, Cingular, AT&T Wireless, Sprint PCS, ALLTEL, Nextel, and U.S. Cellular. *Id.*; see also *Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Fifth Report, FCC 00-289 at App. 5, Table 3 (rel. Aug. 18, 2000).

acquired control of a number of PCS and WCS licenses from Cook Inlet Region, Inc.<sup>9</sup> By the end of 2000, VoiceStream served approximately 3.9 million customers, ranking seventh among mobile telephony operators in the United States in terms of subscribership and revenues.<sup>10</sup> VoiceStream is also an authorized provider of international global resale services, and intends to continue to provide such services through several of its wholly-owned subsidiaries.<sup>11</sup>

## 2. Deutsche Telekom AG

6. DT, a publicly-traded German corporation, is headquartered in Bonn, Germany.<sup>12</sup> Currently, the German government holds a 60-percent voting interest in DT.<sup>13</sup> The Applicants state that the government's interest will decline to 45.7 percent as a result of DT's merger with VoiceStream, and will decline further to approximately 45 percent following the closing of DT's merger with Powertel.<sup>14</sup>

7. Within Germany, DT provides telecommunications and information services, including local and long distance services, mobile services, Internet services, data and IP system solutions, ISDN services, and cable television distribution services.<sup>15</sup> DT is Germany's largest carrier, accounting as of June 2000 for approximately 80 percent of minutes generated daily in Germany.<sup>16</sup> DT provides mobile telephony services in Germany and throughout Europe through T-Mobile International AG (T-Mobile). T-Mobile is Germany's second-largest wireless carrier with approximately 13.4 million subscribers constituting 39

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<sup>9</sup> *In re Applications of Cook Inlet Region, Inc. and VoiceStream Wireless Corporation*, WT Docket No. 00-207, Order, 15 Rcd 24691 (Wir. Tel. Bur. 2000) (*VoiceStream/CIRI Order*).

<sup>10</sup> *VoiceStream Wireless Announces 2000 Financial Result*, Press Release, February 14, 2001.

<sup>11</sup> VoiceStream DT Application at 6 and n.11 (listing the six international section 214 authorizations controlled by VoiceStream and its operating subsidiaries).

<sup>12</sup> *Id.* at 8; *see also* Articles of Incorporation of Deutsche Telekom, Exhibit A to VoiceStream DT Application.

<sup>13</sup> VoiceStream DT Application at 10; VoiceStream Powertel DT Reply at 37. Until it became a stock corporation in 1995, DT was wholly-owned by the German government. Since 1995, the German government has been gradually divesting its stake in DT. VoiceStream DT Application at 9-10. At the time the applications were filed, the German government owned 58.2 percent of DT. After France Telecom sold its stake in DT to the Kreditanstalt fuer Wiederaufbau, or KfW, bank (which is controlled by the German government and federal states) in December 2000, the level of German government ownership in DT (held directly or through KfW) rose to 60 percent. VoiceStream Powertel DT Reply at 37.

<sup>14</sup> VoiceStream DT Application at 10; VoiceStream Powertel DT Reply at 37. *See also infra* Part IV discussing DT's German government ownership and DT's corporate governance structure.

<sup>15</sup> VoiceStream DT Application at 8.

<sup>16</sup> *See* Mid-year Report 2000, Regulatory Authority for Telecommunications and Posts (RegTP) at 13. According to RegTP, when volumes of domestic long distance, international, and fixed to mobile calls are considered, DT accounts for 60 percent of the market. *Id.*

percent of the German market as of June 2000.<sup>17</sup> T-Mobile serves an additional 7.6 million subscribers in other European countries through entities that it controls.<sup>18</sup> T-Mobile's PCS systems use a GSM platform to provide voice and data services. DT provides international services between the United States and other countries through Deutsche Telekom, Inc. (DTI), a wholly-owned subsidiary of DT that is authorized to provide U.S. international facilities-based and resale services.<sup>19</sup> DT also holds an approximately nine percent non-attributable interest in Sprint PCS.<sup>20</sup>

### 3. Powertel, Inc.

8. Powertel is a publicly-traded Delaware corporation, headquartered in West Point, Georgia.<sup>21</sup> Powertel, through its various wholly-owned subsidiaries, is licensed to provide wireless PCS service in 12 states in the southeastern United States.<sup>22</sup> Like DT and VoiceStream, Powertel uses the GSM standard in its provision of PCS service. As of June 30, 2000, Powertel served approximately 727,000 customers.<sup>23</sup> Powertel is also authorized to provide international global resale services.<sup>24</sup>

### B. The Merger Transactions

9. On July 23, 2000, VoiceStream and DT entered into an Agreement and Plan of Merger (VoiceStream DT Merger Agreement) that, upon consummation, will make VoiceStream a wholly-owned subsidiary of DT.<sup>25</sup> Under the terms of the VoiceStream DT Merger Agreement, DT will acquire 100 percent of the outstanding stock of VoiceStream.<sup>26</sup> To accomplish this acquisition, DT has created a

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<sup>17</sup> VoiceStream DT Application at 8.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 9.

<sup>20</sup> See Letter from John H. Harwood II, Counsel for Deutsche Telekom AG, to Magalie Roman Salas, Secretary, Federal Communications Commission, at 2 (filed Feb. 23, 2001) (DT Feb. 23 *Ex Parte* Letter); VoiceStream DT Application at 29 n.87.

<sup>21</sup> Powertel DT Application at 3.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Powertel received authority to provide global resale services in FCC File No. ITC-214-20000727-00441 (effective Aug. 18, 2000). Powertel has notified the Commission that its operating subsidiaries are providing service under their parent's authorization, pursuant to section 63.21(i) of the Commission's rules, 47 C.F.R. § 63.21(i).

<sup>25</sup> VoiceStream DT Application, Exh. B, *VoiceStream Wireless Corp. and Deutsche Telekom AG, Agreement and Plan of Merger between Deutsche Telekom AG and VoiceStream Wireless Corporation Dated July 23, 2000 and Related Documents.*

<sup>26</sup> VoiceStream DT Application at 16.

wholly-owned subsidiary under Delaware law that will be merged with and into VoiceStream, with VoiceStream as the surviving entity.<sup>27</sup>

10. On August 26, 2000, Powertel and DT entered into an Agreement and Plan of Merger (Powertel DT Merger Agreement) that will, upon consummation, give DT ultimate control of Powertel.<sup>28</sup> The Powertel DT merger will occur only if DT and VoiceStream consummate their proposed merger.<sup>29</sup> After consummation of the VoiceStream DT and the Powertel DT mergers, the parties anticipate that Powertel's services will be provided under the VoiceStream brand. Under the Powertel DT Merger Agreement, DT will acquire 100 percent of the outstanding common stock of Powertel.<sup>30</sup> To accomplish this acquisition, DT has incorporated a wholly-owned subsidiary, pursuant to Delaware law, that will be merged with and into Powertel, with Powertel as the surviving entity.<sup>31</sup>

11. If DT and VoiceStream do not consummate their proposed merger, VoiceStream intends to acquire Powertel directly. Therefore, VoiceStream and Powertel concurrently filed applications seeking authority to transfer control of Powertel's licenses and authorizations to VoiceStream in the event that the VoiceStream-DT merger is not consummated.<sup>32</sup> The VoiceStream Powertel Application does not include a

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<sup>27</sup> *Id.* VoiceStream shareholders will receive 3.2 shares of DT's stock and \$30 cash for each share of VoiceStream common stock, subject to certain adjustments. Alternatively, VoiceStream shareholders may elect an all-stock (3.7647 DT shares per VoiceStream share) or an all cash (\$200 per VoiceStream share) option, subject to proration and other adjustments. DT also will assume approximately \$5 billion of the net debt of VoiceStream. Following the closing of the merger, current VoiceStream shareholders are expected to own approximately 22 percent of DT. VoiceStream is expected to become a subsidiary of T-Mobile, but will continue to use the VoiceStream brand. The Applicants state that VoiceStream's existing senior management will continue to lead T-Mobile's U.S. mobile operations. *Id.*

<sup>28</sup> See Letter from Louis Gurman, Counsel for VoiceStream Wireless Corp., *et al.*, to Don Abelson, Chief, International Bureau, IB Docket No. 00-187, App. B, *Powertel, Inc. and Deutsche Telekom AG, Agreement and Plan of Merger between Deutsche Telekom AG and Powertel, Inc.* Dated August 26, 2000, (DT Powertel Merger Agreement) (filed Feb. 9, 2001) (Applicants Feb. 9 Response to Supplemental Information Request).

<sup>29</sup> Powertel DT Application at 2.

<sup>30</sup> Applicants Feb. 9 Response to Supplemental Information Request, App. B, DT Powertel Merger Agreement at 2.

<sup>31</sup> Applicants Feb. 9 Response to Supplemental Information Request, App. B, DT Powertel Merger Agreement at 2. Holders of Powertel common stock will receive 2.6353 shares of DT's stock; holders of Powertel Series A and B Preferred Shares will receive 121.9294 shares of DT's stock; holders of Powertel Series D Preferred Shares will receive 93.0106 shares of DT's stock; and holders of Powertel Series E and F Preferred Shares will receive 179.5979 shares of DT's stock (plus 2.6353 shares of DT's stock for each share of Powertel common stock that such preferred shareholders are owed as dividends). Powertel DT Application at 8. DT will also assume approximately \$1.2 billion of Powertel's debt. *Id.*

<sup>32</sup> See *Powertel, Inc. and VoiceStream Wireless Corporation*, Application for Transfer of Control, IB Docket No. 00-187 at 2 (filed Sept. 18, 2000) (VoiceStream Powertel Application).



petition for declaratory ruling pursuant to section 310(b)(4) because the level of foreign ownership in the merged entity would be consistent with VoiceStream's current foreign ownership authorization.<sup>33</sup>

### C. Applications and Review Process

#### 1. Commission Review

12. The applications described above cover the proposed transfer of control of VoiceStream's and Powertel's radio licenses pursuant to section 310(d) of the Act. Pursuant to section 214 of the Act, VoiceStream and Powertel also filed certain applications seeking Commission approval to transfer to DT control of international section 214 authorizations held by various operating subsidiaries of VoiceStream or Powertel.<sup>34</sup>

13. Both the VoiceStream DT Application and the Powertel DT Application (collectively, the DT Transfer Applications) also include Petitions for Declaratory Ruling pursuant to the Commission's *Foreign Participation Order*,<sup>35</sup> seeking Commission approval of the indirect foreign ownership of common carrier radio licenses held by certain licensee subsidiaries of VoiceStream and Powertel.<sup>36</sup> VoiceStream and Powertel also filed Foreign Carrier Affiliation Notifications with the Commission stating that, after the proposed transaction, they will have an affiliation, within the meaning of section 63.09 of the Commission's rules, with a foreign carrier that has market power in its home market.<sup>37</sup>

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<sup>33</sup> Powertel DT Application at 1-2; VoiceStream Powertel Application at 19-21; *see also* Letter from John H. Harwood II, Counsel for Deutsche Telekom AG, *et. al.*, to Jacquelynn Ruff, Associate Division Chief, Telecommunications Division, International Bureau, IB Docket No. 00-187 (filed Mar. 12, 2001) (Applicants Mar. 12 Response to Supplemental Information Request). VoiceStream is currently authorized to be indirectly owned up to 30.6 percent by Hutchison Whampoa Limited, a Hong Kong company. *See Applications of VoiceStream Wireless Corporation or Omnipoint Corporation, Transferors, et al.*, Memorandum Opinion and Order, 15 FCC Rcd 3341, 3347-50, paras. 13-20 (2000) (*VoiceStream/Omnipoint Order*). Applicants estimate that the merged entity would have approximately 17.6 percent Hong Kong ownership. *See* Applicants Mar. 12 Response to Supplemental Information Request. The merged entity also would have approximately 17.03 percent non-Hong Kong foreign ownership, *id.*, an amount within the 25-percent benchmark in section 310(b)(4).

<sup>34</sup> VoiceStream Wireless Corporation, Powertel, Inc., and Deutsche Telekom AG Seek FCC Consent to Transfer Control of Licenses and Authorizations and Request Declaratory Ruling Allowing Indirect Foreign Ownership, IB Docket No. 00-187, Public Notice, DA 01-280 (rel. Oct. 11, 2000) (VoiceStream DT Public Notice).

<sup>35</sup> *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, Market Entry and Regulation of Foreign Affiliated Entities*, IB Docket Nos. 97-142, 95-22, Report and Order and Order on Reconsideration, 12 FCC Rcd 23891 (1997) (*Foreign Participation Order*) (specifying procedure for section 310(b)(4) filings).

<sup>36</sup> VoiceStream DT Application at 33; Powertel DT Application at 22.

<sup>37</sup> *See* 47 C.F.R. § 63.09.

14. On October 11, 2000, the International Bureau and the Wireless Telecommunications Bureau released a Public Notice seeking public comment on the proposed transactions.<sup>38</sup> More than 25 parties timely filed comments supporting or opposing grant of the applications, or petitions to deny the applications.<sup>39</sup> On December 6, 2000, the International Bureau adopted a protective order under which third parties would be allowed to review confidential or proprietary documents that the Applicants submitted.<sup>40</sup> In February 2001, International Bureau staff requested additional information from the Applicants,<sup>41</sup> and the Applicants' responses are included in the record.

15. In addition, on February 1, 2001, the International Bureau released a Public Notice seeking comment on four petitions for declaratory ruling pursuant to section 310(b)(4) and one petition for declaratory ruling under sections 310(b)(4) and 310(d) of the Act, filed by entities in which VoiceStream currently holds indirect, non-controlling interests.<sup>42</sup>

## 2. Department of Justice Review

16. The Antitrust Division of the U.S. Department of Justice reviews telecommunications mergers pursuant to section 7 of the Clayton Act, which prohibits mergers that are likely to substantially lessen competition.<sup>43</sup> The Antitrust Division's review is limited solely to an examination of the competitive effects of the acquisition, without reference to national security, law enforcement or other public interest considerations.<sup>44</sup> The Antitrust Division reviewed both the potential horizontal and vertical effects of the proposed acquisition of VoiceStream by DT and concluded that the proposed acquisition does not violate

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<sup>38</sup> See VoiceStream DT Public Notice, *supra* note 34. The initial pleading cycle set November 13, 2000 as the deadline for petitions/comments and November 27, 2000 as the deadline for oppositions/responses. On November 8, 2000, the Bureau granted a request for a 30-day extension of the comment deadline filed by the Honorable Ernest F. Hollings, U.S. Senate (Senator Hollings). *VoiceStream Wireless Corporation and Powertel, Inc. and Deutsche Telekom AG*, IB Docket No. 00-187, Order, 15 FCC Rcd 21575 (Intl. Bur. 2000).

<sup>39</sup> The parties that filed formal pleadings in this proceeding are listed in Appendix A. In addition to those formal pleadings, we have received many informal comments through *ex parte* submissions. These *ex parte* filings are available on the Commission's website at [www.fcc.gov/transaction/voicestream-deutsche.html](http://www.fcc.gov/transaction/voicestream-deutsche.html).

<sup>40</sup> *VoiceStream Wireless Corporation and Powertel, Inc. and Deutsche Telekom AG*, IB Docket No. 00-187, Order Adopting Protective Order, 15 FCC Rcd 24042 (Intl. Bur. 2000).

<sup>41</sup> See Letters from Donald Abelson, Chief, International Bureau, to Cheryl A. Tritt, *et al.*, Counsel for VoiceStream Wireless Corp. (Feb. 2, 2001); William T. Lake, *et al.*, Counsel for Deutsche Telekom AG (Feb. 2, 2001); and Edward Yorkgitis, Jr., Counsel for Powertel (Feb. 2, 2001).

<sup>42</sup> See Declaratory Ruling Public Notice, *supra* note 3; see also *infra* Part VIII discussing related petitions.

<sup>43</sup> 15 U.S.C. § 18.

<sup>44</sup> See DT VoiceStream Powertel Reply, App. C, Tab C, Letter from Robert Raben, Assistant Attorney General, U.S. Department of Justice to the Honorable Billy Tauzin, Chairman, Subcommittee on Telecommunications, Trade, and Consumer Protection, Committee on Commerce, U.S. House of Representatives, IB Docket No. 00-187 (Sept. 14, 2000) (Department of Justice Sept. 14 Letter).

the Clayton Act.<sup>45</sup> Specifically, the Antitrust Division concluded that DT's minority interest in Sprint, in combination with its proposed acquisition of VoiceStream, would not substantially lessen competition in the United States.<sup>46</sup> The Antitrust Division also considered whether, with respect to calls between DT's German and U.S. customers, the proposed acquisition would enable DT to use its dominant position in Germany to substantially lessen competition through the vertical relationship between DT and VoiceStream. The Antitrust Division concluded that VoiceStream accounts for such a small portion of the origination and termination of U.S.-German calls that competition would not be substantially lessened by the proposed acquisition.<sup>47</sup>

#### **D. Framework for Analysis**

17. Pursuant to sections 214(a) and 310(d) of the Act, the Commission must determine whether the Applicants have demonstrated that the proposed transfer of control of VoiceStream's and Powertel's licenses will serve the public interest, convenience and necessity.<sup>48</sup> We also must determine whether the transfers of control are consistent with the requirements of sections 310(a) and (b) regarding foreign ownership of radio licenses. Section 310(d) further requires that we consider the applications as if the proposed transferee were applying for the licenses directly under section 308 of the Act.<sup>49</sup> Thus, we must examine DT's qualifications to hold licenses. In discharging these statutory responsibilities, we have weighed the potential public interest harms of the proposed transactions against the potential public interest benefits to ensure that, on balance, the transfers of control serve the public interest, convenience, and necessity.<sup>50</sup>

18. Because DT is a foreign carrier, we are also guided by the Commission's policies regarding foreign participation in U.S. markets. Specifically, in 1997, in response to market changes such as the market-opening commitments undertaken by World Trade Organization (WTO) Members in the WTO

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<sup>45</sup> See Department of Justice Sept. 14 Letter at 1.

<sup>46</sup> See *id.* at 2.

<sup>47</sup> See *id.* (noting that "by any measure VoiceStream accounts for only a very small portion of the origination and termination of U.S.-German calls").

<sup>48</sup> 47 U.S.C. §§ 214(a), 310(d).

<sup>49</sup> Section 310 provides that the Commission shall consider any such applications "as if the proposed transferee or assignee were making application under Section 308 for the permit or license in question." 47 U.S.C. § 310(d). Furthermore, the Commission is expressly barred from considering "whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee." *Id.*

<sup>50</sup> See, e.g., *In the Matter of AT&T Corp., British Telecommunications, plc, VLT Co. L.L.C., Violet License Co. LLC, and TNV [Bahamas] Limited Applications For Grant of Section 214 Authority, Modification of Authorizations and Assignment of Licenses in Connection with the Proposed Joint Venture Between AT&T Corp. and British Telecommunications, plc*, IB Docket No. 98-212, Memorandum Opinion and Order, 14 FCC Rcd 19410 (1999) (*AT&T/BT Order*).

Basic Telecommunications Agreement,<sup>51</sup> the Commission adopted the *Foreign Participation Order*, which contains rules and policies relating to the participation in United States telecommunications markets of foreign carriers and U.S. carriers affiliated with foreign carriers.<sup>52</sup> In the *Foreign Participation Order*, the Commission found that foreign investment can promote competition in U.S. markets and that the public interest is served by permitting more open investment in U.S. common carrier radio licensees by entities from WTO member countries.<sup>53</sup> Accordingly, the Commission adopted, as a factor in the public interest analysis, a rebuttable presumption that competitive concerns under sections 214 and 310(b)(4) of the Act are not raised by applications that propose indirect ownership by entities from WTO Members of common carrier and aeronautical radio licensees, unless granting the application would pose a very high risk to competition in a U.S. market that cannot be addressed by conditions.<sup>54</sup>

## II. QUALIFICATIONS OF APPLICANTS

### A. Qualifications of Transferors

19. As a threshold matter, we must determine whether the Applicants meet the requisite qualifications to hold and transfer licenses under section 310(d) of the Act and our rules. In general, when evaluating assignment and transfer applications under section 310(d), we do not re-evaluate the qualifications of transferors.<sup>55</sup> The exceptions to this general rule occur where issues related to basic qualifications have been designated for hearing by the Commission or have been sufficiently raised in petitions to warrant the designation of a hearing.<sup>56</sup>

20. Although no party has directly challenged the basic qualifications of Powertel or VoiceStream as transferors, Senator Hollings has alleged that VoiceStream is currently a representative of

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<sup>51</sup> The commitments are incorporated into the General Agreement of Trade in Services (GATS) by the Fourth Protocol to the GATS. *See* Fourth Protocol to the General Agreement on Trade in Services (WTO 1997), 36 I.L.M. 366 (1997).

<sup>52</sup> *See generally Foreign Participation Order*, 12 FCC Rcd 23891.

<sup>53</sup> *Id.* at 23940, para. 111.

<sup>54</sup> *Id.* at 23913-14, paras. 50-53 (describing exceptional circumstances that could justify denial).

<sup>55</sup> *See VoiceStream/Omnipoint Order*, 15 FCC Rcd at 3347, para. 13 n.38 (citing *MobileMedia Corporation et al.*, Memorandum Opinion and Order, 14 FCC Rcd 8017, 8018, para. 4 (1999) (citing *Jefferson Radio Co. v. FCC*, 340 F.2d 781, 783 (D.C. Cir. 1964)); *see also* Stephen F. Sewell, Assignments and Transfers of Control of FCC Authorizations Under Section 310(d) of the Communications Act of 1934, 43 Fed. Comm. L.J. 277, 339-40 (1991) (stating that the policy of not approving assignments or transfers when issues regarding the licensee's basic qualifications remain unresolved is designed to prevent licensees from evading responsibility for misdeeds committed during the license period).

<sup>56</sup> *See VoiceStream/Omnipoint Order*, 15 FCC Rcd at 3347, para. 13 n.38.

the German government.<sup>57</sup> Specifically, Senator Hollings questions whether a September 6, 2000, investment of \$5 billion by DT in VoiceStream, and the provisions contained in the VoiceStream DT Merger Agreement, violate the foreign ownership restrictions of section 310(b)(4) of the Act,<sup>58</sup> and, in effect, constitute an unauthorized transfer of control of VoiceStream to DT in violation of section 310(d) of the Act.<sup>59</sup> These arguments also directly raise broader issues regarding foreign government ownership in DT that implicate our public interest analysis under section 310(b)(4) of the Act, and we address those issues in Part IV below. We limit our discussion in this section to the narrow issue of whether the \$5 billion investment in VoiceStream by DT, in conjunction with provisions of the VoiceStream DT Merger Agreement, violate the Act or our rules. We conclude that they do not, and that there are no substantial and material questions of fact to warrant the designation of a hearing on these issues.<sup>60</sup>

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<sup>57</sup> Senator Hollings first raised these concerns in a letter, filed in this docket in advance of a recent spectrum auction (Auction 35), requesting a declaratory ruling as to whether DT's \$5 billion investment, when combined with the provisions of section 5.15 of the VoiceStream DT Merger Agreement, disqualified VoiceStream for participation in Auction 35. *See* Letter from the Honorable Ernest F. Hollings, Ranking Democrat, Committee on Commerce, Science and Transportation, U.S. Senate, to William E. Kennard, Chairman, Federal Communications Commission, IB Docket No. 00-187 (filed Nov. 30, 2000) (Senator Hollings Nov. 30 *Ex Parte* Letter). On December 8, 2000, Chairman Kennard responded to Senator Hollings, declining to issue a declaratory ruling and indicating that VoiceStream's qualifications to hold a license won at Auction 35 would be addressed as part of the Commission's long-form review in the event VoiceStream was a successful bidder at the auction. *See* Letter from William E. Kennard, Chairman, Federal Communications Commission, to The Honorable Ernest F. Hollings, Ranking Member, Committee on Commerce, Science, and Transportation, U.S. Senate (dated Dec. 8, 2000). Senator Hollings again raised the issue of DT's current control of VoiceStream in his comments filed in this proceeding. Senator Hollings Comments at 5.

<sup>58</sup> 47 U.S.C. § 310(b)(4) (providing that "[n]o broadcast or common carrier . . . radio station license shall be granted to or held by . . . any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license").

<sup>59</sup> 47 U.S.C. § 310(d) (providing that "[n]o construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby").

<sup>60</sup> A request has been made for the designation of a hearing based on these issues. *See* Senator Hollings Comments (as amended) at 2. Generally, requests to designate applications for hearing must meet the test set out in *Astroline Communications Company Limited Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988), which is the two-step test established in sections 309(d)(1) and (2) of the Act. *Id.* at 1560. These provisions require a protesting party to "submit a petition containing 'specific allegations of fact sufficient to show . . . that a grant of the application would be prima facie inconsistent with [the public interest, convenience, and necessity].'" *Id.* (citing 47 U.S.C. 309(d)(1)); *see also* 47 C.F.R. § 1.939(d). If the Commission finds that the petition to deny satisfies this standard, the Commission then determines whether "on the basis of the application, the pleadings filed, or other matters which it may officially notice[.] . . . a substantial and material question of fact is presented." *Id.* at 1561 (citing 47 U.S.C. § 309(d)(2)). When a petition to deny meets the threshold standard, the Commission has wide latitude in determining (continued....)

## 1. Background

21. The relevant facts underlying the allegation that there has been a violation of section 310(b)(4) of the Act and an unauthorized transfer of control are not in dispute. On September 6, 2000, DT purchased 3,906,250 shares of VoiceStream voting preferred stock for \$5 billion, which carried with it voting rights of less than 1.7 percent of VoiceStream's outstanding voting shares.<sup>61</sup> The preferred stock is convertible at DT's option to 31,250,000 shares of VoiceStream common stock if, and only if, the VoiceStream DT Merger Agreement is terminated.<sup>62</sup> At the time of the investment, VoiceStream had a total of 217,936,318 shares on a fully diluted basis.<sup>63</sup> DT's shares, if converted, would have represented 11.49 percent of the total shares of VoiceStream on a fully diluted basis.<sup>64</sup>

22. In addition, section 5.15 of the VoiceStream DT Merger Agreement, requires, among other things, that VoiceStream and members of a DT-appointed Acquisitions Committee develop a schedule of maximum amounts that VoiceStream would be permitted to bid on individual licenses, as well as in the aggregate, in any Commission spectrum auction occurring during the pendency of the merger transaction.<sup>65</sup> Further, during an auction, to the extent VoiceStream desires to bid in excess of the maximum approved bid amounts, VoiceStream would be required to seek further approval from at least one member of the DT-appointed Acquisitions Committee that, under the terms of the VoiceStream DT Merger Agreement, is charged with reviewing acquisitions by VoiceStream prior to consummation of the merger.<sup>66</sup>

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whether the record as a whole presents a substantial and material question of fact warranting a hearing. *Id.* Even though no petitions to deny were filed with respect to these issues, we recognize the seriousness of the allegations and consider below whether they, nevertheless, raise a substantial and material question of fact warranting the designation of a hearing.

<sup>61</sup> VoiceStream Powertel DT Reply at 26-27 n.88; Applicants Feb. 9 Response to Supplemental Information Request at 15 n.43.

<sup>62</sup> VoiceStream DT Application, Exh. B, Tab 19, Certificate of Designation of Rights at 1(i); VoiceStream-DT Merger Agreement at section 5.15(b).

<sup>63</sup> The 217,936,318 shares represent the total shares of VoiceStream common stock then outstanding (214,458,732) combined with the number of common shares that would result if Hutchison Whampoa Ltd. (26,227,586) and DT (31,250,000) converted their preferred shares into common. Applicants Response to Supplemental Information Request at 15 n.44.

<sup>64</sup> Applicants Feb. 9 Response to Supplemental Information Request at 15.

<sup>65</sup> VoiceStream DT Merger Agreement at § 5.15(b). Section 5.15 of the VoiceStream DT Merger Agreement also places restrictions on VoiceStream's ability—pending closing of the instant merger—to make certain acquisitions without prior approval from the Acquisitions Committee.

<sup>66</sup> *Id.* Any member of the Acquisitions Committee may, within 24 hours of being notified of a proposed acquisition, object to such acquisition, or consent is deemed granted. *Id.* The four members of the Acquisitions Committee are specified in Schedule 5.15(c) to the VoiceStream DT Merger Agreement. See Letter from Cheryl A. Tritt, et al., Counsel for Applicants to Jacquelynn Ruff, Associate Division Chief, International Bureau, Federal (continued....)

## 2. The \$5 Billion Investment

23. Senator Hollings argues that, in assessing the level of foreign ownership of an entity, Commission precedent requires us not merely to count the number of shares owned by a foreign entity, but also to compare the percentage of capital being invested by the foreign entity with the total invested capital.<sup>67</sup> Using a total paid-in-capital approach to calculate foreign ownership, this argument suggests that the \$5 billion investment by DT represents a foreign ownership interest of 39 percent in VoiceStream,<sup>68</sup> thereby causing VoiceStream to exceed the 25-percent benchmark in section 310(b)(4),<sup>69</sup> and concludes that, because VoiceStream failed to seek prior Commission consent for this level of ownership, it violated section 310(b)(4) of the Act.<sup>70</sup>

24. We agree that we must closely examine the extent of foreign ownership interests. Under Commission precedent, stock ownership in a publicly-traded corporation has generally been the measure of an investor's beneficial ownership of that corporation. However, in assessing the extent of alien ownership interests in some cases, we have found that the section 310(b)(4) benchmark should be applied "in a manner that considers factors in addition to the number of alien-owned shares of stock where the distribution of shares of stock is not proportionate to equity interests."<sup>71</sup> Specifically, in *Fox I*, the decision upon which the alternate interpretation ultimately relies, the Commission stated that it will use a paid-in-capital analysis to determine foreign ownership in those instances in which "a simple 'count the shares' methodology leads to patently absurd results."<sup>72</sup> As explained below, however, we find that, in this case, a count-the-shares approach accurately measures DT's beneficial ownership of VoiceStream.

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Communications Commission, IB Docket No. 00-187 at Schedule 5.15(a)(D) (filed Mar. 2, 2001) (Applicants Mar. 2 Response to Supplemental Information Request).

<sup>67</sup> Senator Hollings Nov. 30 *Ex Parte* Letter at 2 (citing *Applications of NextWave Personal Communications, Inc., for Various C-Block Broadband PCS Licenses*, Memorandum Opinion and Order, 12 FCC Rcd 2030, 2045 (Wir. Tel. Bur. 1997) (*NextWave*)).

<sup>68</sup> Senator Hollings Nov. 30 *Ex Parte* Letter at 2. In calculating the 39 percent interest, Senator Hollings states that adding the \$5 billion investment by DT to "VoiceStream's previously reported shareholder equity of \$7.8 billion leads to the conclusion that the Deutsche Telekom investment represents 39% of the new total of \$12.8 billion in paid-in equity." *Id.* The Applicants disagree with the use of the paid-in-capital analysis and question Senator Hollings's reliance on the \$7.8 billion figure. See Applicants Feb. 9 Response to Supplemental Information Request at 16 n.49.

<sup>69</sup> Senator Hollings Nov. 30 *Ex Parte* Letter at 2.

<sup>70</sup> *Id.*

<sup>71</sup> See *In re Applications of Fox Television Stations, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 8452, 8468, para. 36 (1995)(*Fox I*); see also *NextWave*, 12 FCC Rcd at 2044-45, para. 35.

<sup>72</sup> *Fox I*, 10 FCC Rcd at 8471, 8473, paras. 43 & 47; see also *NextWave*, 12 FCC Rcd at 2044-45, para. 35.

25. In *Fox I*, the ultimate holding company of Fox Television Stations (FTS), News Corporation Ltd. (News Corp.), had contributed 99 percent of the paid-in capital and held 100 percent of the issued common stock of FTS' corporate parent, which entitled News Corp. to only 24 percent of the voting rights.<sup>73</sup> The Commission found it significant that News Corp., as holder of all of the common stock, had the right to substantially all of the licensee's corporate parent's profits and losses and had the right to substantially all of FTS's assets upon its sale or dissolution.<sup>74</sup> Given the widely divergent characteristics of the various classes of stock and the disparity between the ownership of corporate shares and the beneficial ownership, the Commission found that a count-the-shares approach produced an absurd result. The Commission, therefore, adopted a paid-in-capital analysis, which, for a privately-held corporation such as the one at issue in *Fox I*, produced a more accurate result.<sup>75</sup> Similarly, in the *NextWave* case, the Wireless Telecommunications Bureau used the paid-in-capital approach applied in *Fox I* to unravel the level of foreign ownership of a privately-held company that was trying to qualify as a small business under the Commission's auction eligibility rules.<sup>76</sup> In that case, because much of the foreign investment was held in instruments improperly characterized as debt rather than equity, application of a count-the-shares approach would have produced a misleading determination of the extent of foreign ownership.<sup>77</sup>

26. In addition to the unique factual circumstances in *Fox I* that led the Commission to use a paid-in-capital analysis, the Commission also recognized that using paid-in capital as the appropriate measure could present problems in accurately measuring foreign ownership interests in widely-held corporations.<sup>78</sup> The instant case illustrates the validity of those concerns. Because the prices paid for shares of a widely-held, publicly-traded company, such as VoiceStream, differ based upon the time when each shareholder makes an investment, application of a paid-in-capital methodology for evaluating equity interests in such companies does not accurately reflect a shareholder's equity interests. Although different shareholders likely paid different prices for their shares because of fluctuations in the market between the times of different shareholder investments,<sup>79</sup> any individual shareholder's equity stake in VoiceStream is not a function of the price it paid for its shares. The market price DT agreed to pay for its shares did not entitle it to shareholder rights materially different from the rights of all common shareholders.<sup>80</sup> In particular, DT's

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<sup>73</sup> *Fox I*, 10 FCC Rcd at 8454, para. 2.

<sup>74</sup> *Id.* at 8474, para. 50.

<sup>75</sup> *Id.* at 8471-74, paras. 43-74.

<sup>76</sup> See *NextWave*, 12 FCC Rcd at 2035-43, paras. 12-32; 47 C.F.R. §§ 24.709, 24.712, 24.720.

<sup>77</sup> *NextWave*, 12 FCC Rcd at 2049-67, paras. 43-78.

<sup>78</sup> *Fox I*, 10 FCC Rcd at 8474, para. 49.

<sup>79</sup> Applicants Feb. 9 Response to Supplemental Information Request at 17-18.

<sup>80</sup> *Id.* at 16. The preferred shares DT holds differ from common shares primarily in that the preferred shares have a liquidation preference and receive dividends based on the number of common shares that DT would hold if it converted the preferred shares to common. See VoiceStream Wireless Corporation, Form 8-K, Exh. 4.1, Certificate and Designation of the Powers, Preferences and Relative, Participating, Optional and Other Special Rights and Qualifications, Limitations and Restrictions Thereof of Convertible Voting Preferred Stock of VoiceStream Wireless (continued....)



stake is no different, on a share-for-share basis, from any other shareholder of VoiceStream.<sup>81</sup> Furthermore, VoiceStream, unlike the corporations at issue in *Fox I* and *NextWave*, is a publicly-traded company with a market value ascertainable from the public market. Thus, it was VoiceStream's market value at the time of the \$5 billion investment on which DT's investment was based.<sup>82</sup> Therefore, VoiceStream's status as a widely-held, publicly-traded company, the nature of the relationship between stock and equity generally, and the specific facts of DT's investment—factors which distinguish this case from the precedent on which Senator Hollings relies—lead us to conclude that a count-the-shares approach for determining DT's post-investment ownership of VoiceStream yields an accurate measure of DT's beneficial ownership.<sup>83</sup>

27. Accordingly, we find that the total foreign ownership interest created in VoiceStream by DT's \$5 billion investment on a fully converted basis,<sup>84</sup> was 11.49 percent at the time of investment,<sup>85</sup> well below the 25-percent benchmark of section 310(b)(4).<sup>86</sup> Further, we affirm the determination of the

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Corporation (VoiceStream Certification and Designation of Rights) at §§ 1(b), (d) and (h) (filed Oct. 11, 2000, Securities and Exchange Commission); Applicants Response to Supplemental Information Request at 16.

<sup>81</sup> Applicants Feb. 9 Response to Supplemental Information Request at 17.

<sup>82</sup> *Id.* at 15-16. DT paid "a \$160 share price for the common shares into which DT may convert its interest on termination of the merger—a price \$1 less than the opening price of VoiceStream's stock two days before the execution" of the agreement for the \$5 billion investment. *Id.*

<sup>83</sup> We note that this result would be consistent with the Commission's treatment of similar foreign investments of DT and France Telecom (FT) in Sprint Corporation. See *Sprint Corporation*, Declaratory Ruling and Order, 11 FCC Rcd 1850, 1851, para. 10 (1996). In that case, released after *Fox I*, the Commission did not consider DT's and FT's paid-in capital contributions in measuring their ownership interests in Sprint Corporation, despite the stated potential fluctuations in the companies' capital contributions. *Id.* at 1851, para. 10.

<sup>84</sup> We note that options and other convertible instruments are not considered part of a company's capital stock for purposes of our section 310(b)(4) inquiry. See *Application of Fox Television Stations, Inc.*, Second Memorandum Opinion and Order, 11 FCC Rcd 5714, 5720, para. 16 (1995) (*Fox II*). See also *Univision Holdings, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 6672, 6674 (1992); *Data Transmission Co.*, Declaratory Ruling, 52 FCC 2d 439 (1975). The Applicants, however, have treated their interests on a fully converted basis consistently in their filings, and we evaluate them as such.

<sup>85</sup> According to the parties, "the shares of VoiceStream common stock then outstanding (214,458,732) combined with the common shares into which the preferred shares of both Hutchison (26,227,586) and DT (31,250,000) were convertible, represented 271,936,318 shares." VoiceStream Powertel DT Reply at 25 n.8; Applicants Feb. Response to Supplemental Information Request at 15 n.44.

<sup>86</sup> That DT's \$5 billion investment represents less than a 25 percent foreign ownership interest is further illustrated by comparing the \$5 billion investment to DT's total cumulative investment after the merger is consummated (*i.e.*, the \$5 billion investment plus the total merger consideration). According to the July 24, 2000 VoiceStream and DT press releases announcing the merger, the transaction, not including the \$5 billion investment, was valued at \$50.7 billion, or \$195.75 per fully diluted VoiceStream share based on DT's Euro closing share price on July 21, 2000. See VoiceStream DT Merger Agreement at Tab 21. Therefore, DT's total cumulative investment post-merger would be \$55.7 billion. Using this figure, DT's \$5 billion investment represents 8.97 percent of DT's total cumulative (continued....)

International Bureau and Wireless Telecommunications Bureau (collectively, the Bureaus) in the *VoiceStream-CIRI Order* that DT's \$5 billion investment, which the Bureaus assumed *arguendo* in that proceeding constituted an additional 11.49 percent foreign ownership interest, was well below the level authorized by the most recent rulings on VoiceStream's foreign ownership.<sup>87</sup> Specifically, those rulings permitted VoiceStream's common carrier licensees to be indirectly owned by Hutchison Whampoa Limited, a Hong Kong limited liability company, up to 30.6 percent.<sup>88</sup> The rulings also stated that VoiceStream is authorized to accept an additional up-to-25-percent indirect foreign ownership interest without seeking an additional ruling.<sup>89</sup> The Bureaus found that the aggregation of VoiceStream's foreign ownership interests other than that of Hutchinson Whampoa Limited, including that interest now held by DT, remained within the 25 percent foreign ownership benchmark.<sup>90</sup> Thus, we find that VoiceStream was not required to seek additional Commission approval for the \$5 billion investment by DT, and did not violate section 310(b)(4).

### 3. Section 5.15 of the VoiceStream-DT Merger Agreement

28. We also do not conclude that, because of limitations imposed on VoiceStream's future participation in spectrum auctions by section 5.15 of the VoiceStream DT Merger Agreement, "the German government, through Deutsche Telekom, is already exercising control over VoiceStream,"<sup>91</sup> in effect,

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investment. We note that press reports at the time the merger was announced valued the deal between \$44.85 billion and \$51 billion. See Jill Carroll and Daniel Schwammenthal, *Deutsche Telekom Confronts Criticism of VoiceStream Deal*, Wall St. J. Europe, Jul. 25, 2000; *Political Potholes in DT's Path*, Comm. Daily, Jul. 25, 2000. Even using the lower estimate of \$44.85 billion, the \$5 billion investment would represent only 10.10 percent of DT's total cumulative investment.

<sup>87</sup> See *VoiceStream/CIRI Order*, 15 FCC Rcd at 24697, para. 11. No question was raised in the CIRI proceeding as to the proper measurement of DT's foreign ownership, and the *VoiceStream/CIRI Order* did not make a specific finding as to the amount of foreign ownership represented by DT's \$5 billion investment. The Bureaus, however, recognized that a question had been raised in the instant proceeding concerning whether VoiceStream's foreign ownership, as currently structured, is consistent with sections 310(a) and (b)(4) of the Act, and stated that the action in the CIRI proceeding was without prejudice to any future action by the Commission in the instant docket, or any other proceeding. See *id.* at 24696, para. 10 n.33.

<sup>88</sup> *VoiceStream/Omnipoint Order*, 15 FCC Rcd at 3347-50, paras. 13-20; *In re Applications of Aerial Communications, Inc., Transferor, and VoiceStream Wireless Holding Corp., Transferee*, WT Docket No. 00-3, Memorandum Opinion and Order, 15 FCC Rcd 10089, 10094-96, paras. 10-16 (Wir. Tel. Bur. 2000) (*VoiceStream/Aerial Order*).

<sup>89</sup> *VoiceStream/Omnipoint Order*, 15 FCC Rcd at 3347-50, paras. 13-20; *VoiceStream/Aerial Order*, 15 FCC Rcd at 10094-96, paras. 10-16.

<sup>90</sup> *VoiceStream/CIRI Order*, 15 FCC Rcd at 24691, para. 11.

<sup>91</sup> Senator Hollings Comments at 5. These concerns are based on statements made in DT's Form F-4 filed with the Securities and Exchange Commission (SEC) on October 4, 2000, which summarized the provisions of the VoiceStream DT Merger Agreement. Senator Hollings Comments at 5 (citing Form F-4 Registration Statement filed by Deutsche Telekom AG, with the U.S. Securities and Exchange Commission, dated Oct. 4, 2000).

making VoiceStream a representative of the German government in violation of section 310(a) of the Act, and constituting an unauthorized transfer of control under section 310(d) of the Act.<sup>92</sup> Because DT's approximate 1.7 percent voting interest in VoiceStream is limited, we focus our analysis on the provisions of section 5.15(b) of the VoiceStream DT Merger Agreement, which we find are substantially similar to the types of agreements previously found by the Commission not to constitute transfers of control.<sup>93</sup> We therefore find that there has been no unauthorized transfer of control of VoiceStream to DT, or indirectly to the German government.

29. The Commission has held that certain types of investor protections and purchaser safeguards, including limitations on a company making substantial outlays of capital without first obtaining the consent of the buyer or investor, do not *per se* constitute a premature transfer of control.<sup>94</sup> Further, the Commission has allowed many types of safeguards to permit licensees to attract investment, recognizing that "the inclusion of such provisions is a common practice to induce investment and ensure that the basic interests of such shareholders are protected."<sup>95</sup> The sections in the VoiceStream DT Merger Agreement regarding VoiceStream's participation in spectrum auctions are part of larger provisions governing acquisitions by VoiceStream generally during the pendency of the merger.<sup>96</sup> The substantial outlay of capital required in a spectrum auction is demonstrated by VoiceStream's participation in Auction 35.<sup>97</sup> We

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<sup>92</sup> Senator Hollings Nov. 30 *Ex Parte* Letter at 2; Senator Hollings Comments at 5.

<sup>93</sup> *Applications of Puerto Rico Telephone Authority, Transferor, and GTE Holdings (Puerto Rico) LLC, Transferee*, Memorandum Opinion and Order, 14 FCC Rcd 3122, 3141-42, paras. 43-44 (1999); *Implementation of Section 309(j) of the Communications Act*<sup>34</sup>*Competitive Bidding*, PP Docket No. 93-253, Fifth Memorandum Opinion and Order, 10 FCC Rcd 403, 447-448, para. 81 (1994) (*Competitive Bidding Order*); *Request of MCI Communications Corporation, British Telecommunications plc, Joint Petition for Declaratory Ruling Concerning Section 310(b)(4) and (d) of the Communications Act of 1934, as amended*, Declaratory Ruling and Order, 9 FCC Rcd 3960, 3962, para. 14 (1994) ("The Commission has previously held that covenants that give a party the power to block certain major transactions of a company do not in and of themselves represent the type of transfer of corporate control envisioned by Section 310(d).").

<sup>94</sup> *See id.*

<sup>95</sup> *Competitive Bidding Order*, 10 FCC Rcd at 447-448, para. 81 (1994); *see also NextWave*, 12 FCC Rcd at 2042-43, para. 30; *Applications of GWI PCS, Inc.*, 12 FCC Rcd 6441, 6455, para. 33 (Wir. Tel. Bur. 1997); *but see* 47 C.F.R. § 1.2110(c)(2); *Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures*, WT Docket No. 9782, Order on Reconsideration, Fifth Report and Order, and Fourth Notice of Proposed Rulemaking, 15 FCC Rcd 15293, 15323-27, paras. 58-67 (amending small business eligibility rule to attribute "controlling interests").

<sup>96</sup> For example, section 5.15(a) provides that VoiceStream is required to seek approval for any acquisition exceeding \$500 million, or acquisitions, in the aggregate exceeding \$750 million. VoiceStream DT Merger Agreement at section 5.15(a). VoiceStream disclosed that it had an agreement with DT relating to the licenses being auctioned in its FCC Form 175 application, filed in anticipation of Auction 35. *See* VoiceStream PCS BTA I License Corporation, Form 175, Exh. B (filed Nov. 6, 2000, resubmitted Nov. 28, 2000).

<sup>97</sup> VoiceStream was the high bidder for 19 licenses, representing more than \$482 million in bids, and holds an ownership interest in another entity, Cook Inlet/VS GSM V, LLC, which placed winning bids totaling more than (continued....)

agree that the provisions of section 5.15 of the VoiceStream DT Merger Agreement do not indicate “that VoiceStream has ceded or will cede day-to-day operating control of the company to DT in violation of the Commission’s rules.”<sup>98</sup> In addition, the evidence in the record regarding how the Applicants applied this provision in the context of VoiceStream’s participation in Auction 35 causes us no further concern.<sup>99</sup> Accordingly, we find that the provisions of section 5.15(b) of the VoiceStream DT Merger Agreement did not result in an unauthorized transfer of control of VoiceStream to DT in violation of section 310(d) of the Act, nor did these provisions make VoiceStream a representative of DT or, by extension, the German government, in violation of section 310(a) of the Act. We conclude, therefore, that neither DT’s \$5 billion investment in VoiceStream nor the provisions of the VoiceStream DT Merger Agreement raise substantial and material questions of fact regarding VoiceStream’s qualifications as transferor, warranting a hearing

## **B. Qualifications of Transferee**

30. Pursuant to section 308 of the Act, and as a regular part of our public interest analysis, we determine whether the proposed transferee or assignee is qualified to hold Commission licenses.<sup>100</sup> Except to the extent that the foreign government ownership issues discussed below bear on DT’s qualifications, no parties have challenged the legal, financial or other basic qualifications of DT as transferee. Therefore, based on our independent review of the legal qualifications of DT as transferee, and having found no reason to examine further DT’s qualifications, we conclude that DT is legally and otherwise qualified to hold the licenses at issue.<sup>101</sup>

31. Likewise, no party has directly challenged VoiceStream’s basic qualifications as transferee of the Powertel licenses with respect to the proposed alternative transaction between VoiceStream and

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\$500 million. *See* Applicants Feb. 9 Response to Supplemental Information Request at 22; *C and F Block Broadband Personal Communications Services (PCS) Auction, Applications Accepted for Filing, Auction Event No. 35*, Public Notice, DA 01-520 (rel. Feb. 27, 2001).

<sup>98</sup> Letter from John W. Stanton, Chairman and Chief Executive Officer, VoiceStream Wireless, to William E. Kennard, Chairman, Federal Communications Commission, at 2 (filed Dec. 4, 2000); *see also* VoiceStream Feb. 9 Response to Supplemental Information Requests at 22.

<sup>99</sup> *See* Applicants Feb. 9 Response to Supplemental Information Request at 22. According to the Applicants, the bidding strategy used by VoiceStream in Auction 35 was first approved by VoiceStream’s own Board of Directors, and DT’s Acquisitions Committee, after notification, failed to veto the strategy prior to the auction commencing. *Id.* In addition, when, during the course of Auction 35, VoiceStream needed to deviate from that strategy, the Acquisitions Committee again failed to object. *Id.*

<sup>100</sup> *See* 47 U.S.C. § 308; *VoiceStream/Omnipoint Order*, 15 FCC Rcd at 3347, para. 13; *see also In re Applications of AirTouch Communications, Inc. and Vodafone Group, plc*, Memorandum Opinion and Order, 14 FCC Rcd 9430, 9432-34, paras. 5-9 (Wir. Tel. Bur. 1999) (*Vodafone/AirTouch Order*).

<sup>101</sup> 47 C.F.R. § 1.945(c)(2); *see also* 47 C.F.R. § 1.903(b).

Powertel.<sup>102</sup> However, Senator Hollings raises issues that would implicate VoiceStream's qualifications as transferee of the Powertel licenses, asserting that, because of the \$5 billion investment by DT and certain provisions in the VoiceStream-DT Merger Agreement, VoiceStream has effected an unauthorized transfer of control and violated sections 310(a), 310(b)(4), and 310(d) of the Act.<sup>103</sup> As discussed above, however, we find that there has been no unauthorized transfer of control or violation of the Act or our rules. Accordingly, because the Bureaus have previously found that VoiceStream is fully qualified to hold Commission licenses,<sup>104</sup> and no party has raised any direct objection to VoiceStream's holding the Powertel licenses, we do not find an independent reason to examine further VoiceStream's qualifications as transferee. Therefore, we find that VoiceStream is fully qualified to acquire these licenses.

32. In addition to our inquiry as to a proposed transferee's qualifications, where applications seek consent to transfer control of C and F block PCS licenses, such as the instant applications, we normally are required to determine whether the proposed transferee meets the eligibility criteria under the Commission's rules.<sup>105</sup> We need not do so in this case, however, given the unique history of these licenses. VoiceStream recently acquired control of certain C and F block PCS licenses from Cook Inlet Region, Inc. (CIRI).<sup>106</sup> CIRI transferred the 144 C and F block PCS licenses to VoiceStream pursuant to section 8149 of the Department of Defense Appropriations Act of 2001 (the Defense Appropriations Act).<sup>107</sup> Section 8149 of the Defense Appropriations Act removed all eligibility restrictions and modified the applicable unjust enrichment provisions with respect to the C and F block licenses at issue in this transaction.<sup>108</sup> Accordingly, we need not address the issue of whether DT is eligible to hold these licenses under the Commission's rules.

### III. STATUTORY INTERPRETATION OF SECTIONS 310(a) AND (b)

33. The proposed transfer of control of licenses from VoiceStream and Powertel to DT will result in the companies becoming wholly-owned subsidiaries of DT, a company organized under the laws of

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<sup>102</sup> As discussed above, VoiceStream and Powertel seek Commission consent to the proposed transfer of control of VoiceStream's licenses to Powertel in the event that the DT-VoiceStream merger is not consummated. *See* VoiceStream Powertel Application at 7.

<sup>103</sup> Senator Hollings Nov. 30 *Ex Parte* Letter at 2; Senator Hollings Comments at 5-6. We note that these comments do not address the alternative VoiceStream-Powertel transaction specifically.

<sup>104</sup> *See VoiceStream/CIRI Order*, 15 FCC Rcd at 24695, para. 8 (citing *VoiceStream/Omnipoint Order*, 15 FCC Rcd at 3347-50, paras. 13-20; *VoiceStream/Aerial Order*, 15 FCC Rcd at 10094-96, paras. 10-16).

<sup>105</sup> *See* 47 C.F.R. §§ 1.2110, 24.709, 24.839. We note that, in making arguments about the negative impact of the proposed transfers of control to DT generally, UTStarcom raises specific concerns with the transfer of control of C and F block PCS licenses to DT. UTStarcom Comments at 1.

<sup>106</sup> *See VoiceStream/CIRI Order*, 15 FCC Rcd at 24697-98, para. 13.

<sup>107</sup> Pub. L. No. 106-259, § 8149, 114 Stat. 656 (2000).

<sup>108</sup> *See VoiceStream/CIRI Order*, 15 FCC Rcd at 24692, para. 14.

Germany in which the German government still owns and will continue to own a substantial interest.<sup>109</sup> The Applicants have petitioned the Commission to find that the resulting indirect foreign and government ownership of their common carrier wireless licenses is permissible under section 310(b)(4) of the Act.<sup>110</sup> Insofar as this case requires the Commission to resolve the relationship between the restrictions on foreign government ownership in section 310(a) and the provision providing for indirect foreign government ownership in section 310(b)(4), it is a matter of first impression for the Commission.<sup>111</sup> We first address the interpretation of the foreign ownership restrictions contained in sections 310(a) and (b) and respond to issues raised by commenters in order to identify the appropriate framework for analyzing this case. Based on our analysis, we conclude that, pursuant to the terms of the statute, indirect ownership of the licensee by a foreign government, foreign corporation, and aliens resulting from the proposed transaction should be addressed only under section 310(b)(4). That section provides that an alien or foreign government or their respective representatives or any corporation organized under the laws of a foreign country may hold greater than a 25-percent interest in a corporation that controls a corporate licensee, unless the Commission finds that the public interest will be served by refusal or revocation of the license.<sup>112</sup> We then consider the facts before us in accord with this statutory standard.

#### **A. Background**

34. Section 310 provides several discrete categories of restrictions on foreign ownership of radio licenses. First, sections 310(a) and 310(b)(1) and 310(b)(2) provide:

- (a) The station license required under this Act shall not be granted to or held by any foreign government or the representative thereof.
- (b) No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by –
  - (1) any alien or the representative of any alien;
  - (2) any corporation organized under the laws of any foreign government;

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<sup>109</sup> The German Government began privatizing DT in 1995. As detailed above and discussed further below, the German Government currently owns approximately 60 percent of DT. *See supra* note 13 and accompanying text. Post-transaction, the German government's interest in the licensees will be approximately 45 percent. *See infra* Parts III.C and IV discussing alien and foreign government ownership of DT.

<sup>110</sup> Specifically, the Applicants request that the Commission find that DT's indirect foreign control over VoiceStream's and Powertel's licensee subsidiaries and non-controlling interests in other wireless carriers is in the public interest. VoiceStream DT Application at 1, 18, 33-44; Powertel DT Application at 1, 9, 22-24. *See supra* Part I.

<sup>111</sup> The Commission's International Bureau previously addressed this issue in *In the Matter of Telecom Finland, Ltd*, Order, 12 FCC Rcd 17648 (Int'l Bur. 1997) (*Telecom Finland*), discussed *infra* at para. 44.

<sup>112</sup> *See* 47 U.S.C. § 310(b)(4).

Thus, sections 310(a), (b)(1), and (b)(2) by their express terms prohibit radio licenses from being “granted to or held by” foreign governments and their representatives, aliens and their representatives, and foreign corporations.<sup>113</sup> Section 310(b)(3) extends the prohibition to corporations that are more than 20 percent owned directly by the entities identified in sections 310(a), (b)(1), and (b)(2).<sup>114</sup> Section 310(b)(3) provides:

- (b) No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by –
  - (3) any corporation of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country.

Finally, section 310(b)(4) provides:

- (b) No broadcast or common carrier or aeronautical en route or aeronautical radio station license shall be granted to or held by –
  - (4) any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

Therefore, section 310(b)(4) extends the prohibition to any corporation that is directly or indirectly controlled by another corporation that is more than 25 percent owned by the entities identified in sections 310(a), (b)(1), and (b)(2), if the Commission finds that the public interest will be served by not granting a license in this circumstance.<sup>115</sup>

35. The legislative evolution of these statutory provisions indicates that the categories of restrictions developed over time to reach situations where the foreign connection was progressively less direct and imposed restrictions that were progressively less absolute. The first restrictions, set forth in the Radio Act of 1912, required licensees to be U.S. citizens or domestic corporations (effectively prohibiting aliens, foreign governments, or foreign corporations from holding licenses).<sup>116</sup> That requirement was almost immediately interpreted, according to its plain language, to allow a license to be held by a domestic

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<sup>113</sup> 47 U.S.C. §§ 310(a), 310(b)(1)-(b)(2).

<sup>114</sup> 47 U.S.C. § 310(b)(3).

<sup>115</sup> 47 U.S.C. § 310(b)(4).

<sup>116</sup> See Radio Act of Aug. 13, 1912, Pub. L. No. 62-264, § 2, 37 Stat. 302, 303 (stating “such license shall be issued only to citizens of the United States or [Puerto] Rico, or to a company incorporated under the laws of some State or Territory or of the United States or [Puerto] Rico”).

corporation that was itself a subsidiary of a foreign corporation.<sup>117</sup> The Radio Act of 1927 imposed foreign ownership restrictions in language quite similar to that currently contained in sections 310(a), (b)(1), (b)(2), and (b)(3).<sup>118</sup> It addressed a circumstance not covered under the 1912 Act (foreign ownership of domestic corporations holding licenses) by extending the prohibition of alien ownership to corporations that were more than 20 percent owned by the prohibited entities, in language now reflected in section 310(b)(3).<sup>119</sup> Like sections 310(a), (b)(1) and (b)(2), section 310(b)(3) establishes an absolute prohibition on interests exceeding the 20 percent limit. At the same time, by allowing licensee corporations with up to 20 percent foreign ownership, the provision allows some degree of investment in licensees by those barred from holding licenses directly.

36. In the Communications Act of 1934, Congress added the provision now contained in section 310(b)(4) to address another circumstance not previously covered: foreign ownership of domestic holding companies that directly or indirectly controlled domestic corporations holding licenses.<sup>120</sup> The provision represented a compromise between competing policy considerations. The Navy argued for an absolute prohibition against foreign participation and control of licenses through holding companies.<sup>121</sup>

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<sup>117</sup> *Radio Communication—Issue of Licenses*, 29 Op. Att’y Gen. 579 (1912); see also J. Gregory Sidak, *Foreign Investment in American Telecommunications* 27-28 (1997) (*Foreign Investment*) (discussing Attorney General George W. Wickersham’s advisory opinion concerning the Radio Act’s foreign ownership provisions).

<sup>118</sup> Section 12 of the Radio Act of 1927 provided, among other things, that:

The station license required hereby shall not be granted to, or after the granting thereof of such license shall not be transferred in any manner, either voluntarily or involuntarily, to (a) any alien or the representative of any alien; (b) to any foreign government, or the representative thereof; (c) to any company, corporation, or association organized under the laws of any foreign government; (d) to any company, corporation, or association of which any officer or director is an alien, or of which more than one-fifth of the capital stock may be voted by aliens or their representatives or by a foreign government or representative thereof, or by any company, corporation, or association organized under the laws of a foreign country.

Radio Act of 1927, Pub.L. No. 69-632, § 12, 44 Stat. 1162, 1167.

<sup>119</sup> *Id.*

<sup>120</sup> Study of Communications by an Interdepartmental Committee; Letter from the President of the United States to the Chairman of the Committee on Interstate Commerce transmitting a Memorandum from the Secretary of Commerce Relative to a Study of Communications by an Interdepartmental Committee, S. Comm. Print, 73d Cong. 2d Sess. 6 (1934) (*Interdepartmental Study*) (“In 1927 when the Radio Act was made law, Congress . . . went to a great length in section 12 of that act to prevent foreign influence from entering our communication system. They were unsuccessful, to some extent, as a loophole in the law permits a *foreign-dominated* holding company to own United States communication companies. This flaw in the law has already been utilized for that very purpose and the one member strongly advises that now is the time to remedy the defect.”) (emphasis added).; see also *Federal Communications Commission: Hearings on S. 2910 Before the Sen. Comm. on Interstate Commerce*, 73d Cong., 2d Sess. 166-68 (1934) (1934 Senate Hearings); Sidak, *Foreign Investment* at 64-73.

<sup>121</sup> *Federal Communications Commission: Hearings on H.R. 8301 Before the House Comm. on Interstate and Foreign Commerce*, 73d Cong., 2d Sess. 51-53 (1934). For example, Captain Hooper, Director of Naval Communications testified that “the communications facilities of a nation must be controlled and operated (continued....)



Others countered that restricting foreign control in holding companies that controlled licenses, such as International Telephone and Telegraph, would be detrimental to domestic and international competition and would lead to international retaliation.<sup>122</sup> Balancing these conflicting concerns, Congress chose not to adopt an absolute prohibition.<sup>123</sup> Instead, it barred the entities described in sections 310(a), (b)(1) and (b)(2) from owning more than 25 percent of such a holding company only if the FCC found such restrictions to be in the public interest in the particular case.<sup>124</sup>

37. When section 310 of the Communications Act was enacted in 1934, the provisions contained in current sections 310(a) and (b) were contained in a single section 310(a). In 1974, the Communications Act was amended to separate sections 310(a) into the current sections 310(a) and 310(b).<sup>125</sup> The legislative history reflects that this structural change was designed to lessen the burden on

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exclusively by citizens of that nation, and entirely free from foreign influence.” *1934 Senate Hearings* at 170; *see also Sidak, Foreign Investment* at 64-65 (discussing Hooper’s testimony).

<sup>122</sup> *See To Amend the Radio Act of 1927: Hearings on H.R. 7716 Before the Sen. Comm. on Interstate Commerce*, 72d Cong., 1st Sess. 16 (1932) (statement of Sen. White) (“It might cost this American company its entire foreign setup in some of the countries that might be affected by it. I think, we would all agree that we would much prefer that there were none of these foreign directors but I think that weighs but a feather against the tremendous advantage of having this company maintain its radio services throughout the world and maintain for us here in this country the competitive services which result from their system.”).

<sup>123</sup> *See H.R. Conf. Rep. No. 1918*, 73d Cong., 2d Sess. 48-49; *H.R. 7716*, 72d Cong., 2d Sess., at 17 (1932); *see also Noe v. Federal Communications Commission*, 260 F.2d 739, 741 (D.C. Cir. 1958). Congress declined to adopt an outright ban on alien interests, fearing that such a ban would invite international retaliation. *See 1934 Senate Hearings* at 123.

<sup>124</sup> This restriction also applied to aliens serving as officers or as more than 25 percent of the board of directors until Congress removed the restriction in 1996.

<sup>125</sup> Section 310(a)(1)-(5), prior to the 1974 amendments, provided as follows:

- (a) The station license required shall not be granted to or held by –
  - (1) Any alien or the representative of any alien;
  - (2) Any foreign government or the representative thereof;
  - (3) Any corporation organized under the laws of any foreign government;
  - (4) Any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country;
  - (5) Any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted, after June 1, 1935, by aliens, their representatives, or by

(continued....)

private radio licensees and permit entities other than foreign governments and their representatives to hold private radio licenses directly.<sup>126</sup>

## B. Analysis

38. The primary dispute about the applicable legal standard with respect to foreign government ownership in this case focuses on the interpretation of section 310(a) and its relationship to section 310(b)(4). Senator Hollings asserts that section 310(a) is an absolute prohibition, not only against a foreign government's or its representative's holding a license itself, but against any indirect control by a foreign government or its representative of a licensee as well, including the indirect control structures described in section 310(b)(4).<sup>127</sup> This interpretation would limit the application of section 310(b)(4) to circumstances where ownership exceeds the 25 percent statutory benchmark, but does not amount to indirect control of the licensee. On the other hand, the Applicants urge us to read section 310(a) as prohibiting only the direct holding of a license by a foreign government or its representative.<sup>128</sup> We acknowledge that the statutory provisions and the Commission's interpretations of them are not entirely free from ambiguity. For the reasons that follow, we believe the interpretation most consistent with the statutory language and its history is to address the facts of this case under the standard set out in section 310(b)(4).

39. First, turning to the statutory language, we note that section 310(a) does not expressly prohibit indirect foreign government control of licensees. Meanwhile, the express terms of section 310(b)(4) allow indirect ownership of a licensee corporation in excess of 25 percent by foreign governments and their representatives—as well as aliens, aliens' representatives, and foreign corporations—as long as the

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a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or the revocation of such license.

47 U.S.C. § 310(a)(1)-(5) (1970).

<sup>126</sup> See S. Rep. No. 795, 93d Cong., 2d Sess. 1 (1974) (“The purpose of this legislation is to amend section 310 of the Communications Act of 1934, as amended, to permit direct licensing of aliens and corporations with certain alien officers, directors or stockholders rather than licensing them indirectly under subsection 310(a)(5) of the Communications Act of 1934, as amended, which has been utilized to set up a subsidiary corporation with no alien officers or directors, to be the radio licensee.”). See also *infra* para. 46 discussing the purpose of the 1974 amendments.

<sup>127</sup> Senator Hollings Comments at 2-3.

<sup>128</sup> VoiceStream Powertel DT Reply at 25-26 (arguing that the plain language of section 310(a) only prohibits a government or its representative from actually holding a license in its own name); Applicants Mar. 8 *Ex Parte* Letter at 1, 4-6; see also Letter from the Honorable Michael G. Oxley, Chairman, Committee on Financial Services, U.S. House of Representatives to William E. Kennard, Chairman, Federal Communications Commission, IB Docket No. 00-187 (filed Jan. 18, 2001) (arguing that section 310 does not prohibit a foreign government-owned carrier from obtaining a controlling, indirect ownership interest in a U.S. wireless licensee, provided the FCC finds that ownership to be in the public interest, and noting that denying approval would violate U.S. commitments under the WTO Basic Telecommunications Agreement).

Commission does not find it would serve the public interest to deny such ownership. Nothing in the language of section 310(b)(4) limits its application to holdings that amount to less than control.

40. An interpretation of the statute that section 310(a) absolutely prohibits indirect control of a licensee corporation under the structure described in section 310(b)(4) therefore requires both reading section 310(a) to cover a situation (indirect control) it does not expressly address, and reading section 310(b)(4) not to cover a situation (ownership of a holding company that also constitutes indirect control of the licensee) that is within its express terms. Furthermore, the legislative history demonstrates that section 310(b)(4) was added in 1934 to address indirect ownership and control situations that were not considered covered by the prohibitions in current sections 310(a) or 310(b)(1)-(3). The Conference Report, for example, expressly noted with regard to the precursor of sections 310(a) and 310(b)(1)-(3), “Section 12 of the Radio Act restricting alien control of radio-station licenses does not apply to holding companies.”<sup>129</sup> In adopting section 310(b)(4), however, Congress did not follow the pattern of non-discretionary prohibitions like those in the earlier sections as some had urged it to do. Instead, section 310(b)(4) makes the permissibility of indirect alien, foreign government, or foreign corporate ownership in excess of 25 percent subject to a public interest determination by the Commission.<sup>130</sup>

41. Historically, the Commission has analyzed cases involving indirect alien ownership as described in section 310(b)(4) under that section rather than sections 310(b)(1) or (3), even where the ownership amounted to indirect *de jure* control of the licensee through a holding company that controls the licensee.<sup>131</sup> For example, in the *Cable & Wireless* decision the Commission had to decide whether the proposed controlling interest in the licensee by an indirect, wholly-owned, subsidiary of a publicly-traded English parent company would be permitted.<sup>132</sup> If the Commission had adopted the alternate interpretation

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<sup>129</sup> See H.R. Rep. No. 1918, 73d Cong., 2d Sess., 48; see also *supra* note 120 and accompanying text.

<sup>130</sup> *Fox I*, 10 FCC Rcd at 8475-76, paras. 53-55. Until 1996, this restriction also applied to alien board membership in excess of 25 percent or to any alien officer.

<sup>131</sup> See *In the Matter of the Applications of Intelsat LLC*, Memorandum, Opinion, Order and Authorization, 15 FCC Rcd 15460, 15481, para. 48 (2000) (*Intelsat*) (analyzing indirect holding or control under section 310(b)(4)); *In the Matter of Petition of Cable & Wireless, Inc.*, Declaratory Ruling and Memorandum Opinion and Order, Authorization and Certificate, 10 FCC Rcd 13177, 13178-80, paras. 11-23 (1995) (*Cable & Wireless*) (approving controlling interest by aliens of parent corporation that controlled corporation applying for very small aperture terminal licenses); *In re Applications of GRC Cablevision, Inc.*, Memorandum Opinion and Order, 47 FCC 2d 467-68, para. 3 (1974) (*GRC Cablevision*) (approving controlling interest by aliens of parent corporation that controlled corporation applying for cable antenna radio services licenses at time when such licenses were covered by section 310(b)); see also *In re Application of MAP Mobile Communications, Inc.*, Order, 12 FCC Rcd 6109, 6115-16 (Int'l Bur., 1997) (authorizing wholly-foreign owned company to bid for PCS and CMRS licenses); *In the Matter of Melbourne International Communications, Ltd.*, Order, Authorization and Certificate, 12 FCC Rcd 898, 902, para. 11 (Int'l Bur., 1997) (approving controlling interest by aliens of parent corporation that controlled corporation holding two common carrier satellite earth stations); *In the Matter of GCI Liquidating Trust*, Memorandum Opinion and Order, 7 FCC Rcd 7641, paras. 3-4 (Dom. Fac. Div. 1992) (approving acquisition of controlling interest by aliens of parent corporation that controlled common carrier microwave licensee).

<sup>132</sup> See *Cable & Wireless*, 10 FCC Rcd at 1378-80, paras. 11-23.

urged here by commenters, it would have analyzed the *Cable & Wireless* transaction first under section 310(b)(1) and subsequently applied the permissive provisions of section 310(b)(4) in order to allow the transaction to proceed. Instead, because the ultimate holding company was under alien control, the Commission considered the transaction solely under section 310(b)(4). In similar fashion, when adjudicating the *GRC Cablevision* application, where the ultimate shareholders were Canadian citizens, the Commission analyzed the transaction directly under the provisions of section 310(a)(5) (the precursor to section 310(b)(4)), rather than first under section 310(b)(1).<sup>133</sup>

42. These cases stand for the proposition that section 310(b)(1) does not bar indirect alien control of corporations holding licenses, and we find that they are relevant to the foreign government ownership case before us here. Both sections 310(a) and (b) employ the same operative language involving restrictions on licenses “granted to or held by” foreign governments or aliens and foreign corporations, respectively. In the alien ownership decisions, section 310(b)(4) applies where a holding company is controlled by alien ownership. The language in section 310(b)(4) gives no indication that foreign governments are to be treated any differently than aliens or foreign corporations.

43. Our analysis is also consistent with the Commission’s decision in the *Intelsat* case.<sup>134</sup> The Commission there resolved the indirect alien ownership issue by referring solely to section 310(b)(4), since *Intelsat* involved alien control of a holding company that owned the entity holding the license. In that case, the Commission did not look first at the extent of alien ownership under section 310(b)(1) to determine the existence of control and then proceed to analyze issues under section 310(b)(4). Instead, the Commission considered that the matter was governed exclusively by section 310(b)(4). We believe that a consistent approach ought to be applied to our analysis of foreign government ownership, as the language in section 310(b)(1) prohibiting aliens from holding licenses parallels the language in section 310(a) prohibiting foreign governments from holding licenses. Although our discussion of section 310(a) in the *Intelsat* case could be read to take a different approach, we find that discussion not controlling. In response to arguments made by PanAmSat asserting that foreign government components of *Intelsat* had *de jure* and *de facto* control over Intelsat LLC (the licensee), the Commission pointed out that the 30 percent government-controlled interest in Intelsat constituted neither *de jure* nor *de facto* control over the licensee. That statement was sufficient to dispose of the arguments in *Intelsat*; nothing in the language was intended to imply that section 310(a) is applicable to indirect *de jure* control or to reflect any determination concerning the appropriate scope of matters covered by section 310(a).<sup>135</sup> To the extent that there is any confusion, we take this opportunity to make clear that nothing in the *Intelsat* case should be read as contrary to our current analysis of section 310(a) as the issue is squarely presented by this case.

44. Similarly, in *Telecom Finland*, the only previous decision to discuss the relationship between sections 310(a) and 310(b)(4), the International Bureau was persuaded by the petitioners’ argument

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<sup>133</sup> See *GRC Cablevision*, 47 FCC 2d at 467-68, para. 3.

<sup>134</sup> *Intelsat*, 15 FCC Rcd at 15481-84, paras. 48-55.

<sup>135</sup> In *Intelsat*, the Commission described the test for invoking a section 310(a) analysis as “whether a foreign government or representative thereof exercises direct *de jure* or *de facto* control over a licensee.” *Id.*

and adopted its language that, “[s]ection 310(b)(4) creates an *exception* to section 310(a) to permit a foreign government to hold indirectly a U.S. license.”<sup>136</sup> We believe the better reading is that transactions involving the types of indirect foreign ownership addressed by section 310(b)(4) are governed solely by that section and fall outside the scope of section 310(a) and (b)(1)-(3). *Telecom Finland*’s reference to section 310(b)(4) as an *exception* to section 310(a) unnecessarily complicates the analysis. To the extent that *Telecom Finland* can be read to conflict with today’s decision, it is hereby overruled.

45. Notwithstanding an acknowledgement that control of a licensee by an *alien* in circumstances described in section 310(b)(4) should be dealt with under that section and is not prohibited by section 310(b)(1),<sup>137</sup> an argument has been made that the same circumstances involving foreign government, rather than alien, control should be prohibited by section 310(a).<sup>138</sup> This argument apparently is grounded on the fact that since the 1974 amendments, the foreign ownership restriction found in section 310(a) has been set apart from the restrictions in section 310(b). While the statutory structure might plausibly be subject to several different interpretations, our review of section 310 as a whole, the history of these essentially parallel statutory provisions, and the reasons for the 1974 amendments best support an interpretation that treats foreign individuals, corporations, and governments in the same manner. Thus, we conclude that the scope of sections 310(a) and (b) should be interpreted consistently.

46. As previously noted, prior to 1974, what is now section 310(a) was incorporated in a single list of foreign ownership prohibitions in section 310. It was moved out into a separate subsection in 1974.<sup>139</sup> According to the Senate committee report, the purpose of the legislation was to amend section 310 “to permit direct licensing of aliens and corporations with certain alien officers, directors or stockholders rather than licensing them indirectly.”<sup>140</sup> There is no indication in the committee reports that the 1974 amendments should be interpreted to impose more stringent alien ownership restrictions.<sup>141</sup> We decline, therefore, to infer from the 1974 amendments that Congress intended the Commission either to expand the categories of transactions prohibited by the language placed in section 310(a), or to read into the provision

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<sup>136</sup> *Telecom Finland*, 12 FCC Rcd at 17651, para. 7 (emphasis added).

<sup>137</sup> Senator Hollings Comments at 8 (stating “[t]he only way to reconcile [section 310(a) and 310(b)(4)], then, is to conclude that section 310(b)(4) allows the FCC to find the public interest is served by allowing indirect foreign control, and/or ownership up to 100% of ‘station licenses’ only when the foreign ownership is by a non-government controlled entity”).

<sup>138</sup> *Id.*

<sup>139</sup> See *supra* para. 37 discussing the 1974 amendments to the Communications Act.

<sup>140</sup> S. Rep. No. 795, 93d Cong., 2d Sess. 1 (1974).

<sup>141</sup> *Id.*; H.R. Rep. No. 1423, 93d Cong. 2d Sess. (1974) (noting that “[p]resent law works an inequity upon small corporations which are without the resources and skills necessary to establish subsidiary corporations, and upon partnerships or individual entrepreneurs to whom this options is unavailable” and that the “legislation is designed to provide relief to those persons who use radio services as an incident to their business”).

placed in section 310(b)(4) a limitation on indirect corporate control by foreign governments that does not apply to indirect corporate control by aliens.<sup>142</sup>

47. Some commenters have also argued that DT is a “representative” of the German government within the meaning of section 310(a)’s prohibition because the government allegedly influences management decisions of DT, provides substantial financial backing to DT, and guarantees certain civil service benefits to employees of DT.<sup>143</sup> This interpretation of the term “representative” seems to be based on the assumption that if it can be shown that a foreign government exercises *de facto* control over an entity, that entity becomes a “representative of” the foreign government. Such an interpretation would expand the definition beyond the scope of the statute’s plain language and the Commission’s precedent. The Commission consistently has construed “representative” of an alien or foreign government to apply to *individuals* “acting on behalf of” or “in conjunction with” the foreign entity.<sup>144</sup> Granting “representative” a broader reach effectively reads section 310(a) to include situations already covered by the plain language of section 310(b)(4), which covers specific indirect forms of investments involving “foreign governments or representatives thereof.” This broader interpretation also is inconsistent with the use of “representative of any alien” in section 310(b)(1), which has been recognized not to be an absolute bar to 100 percent indirect

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<sup>142</sup> The Applicants, going in the opposite direction, argue that the proper interpretation of section 310(a) is to limit it to its express terms, prohibiting only governments and their representatives from actually holding a license. VoiceStream Powertel DT Reply at 25-26. As explained above, we agree with the Applicants that section 310(a) was not intended to govern matters that are specifically addressed in section 310(b)(4). We believe, however, there may be circumstances in which it is appropriate to consider under sections 310(a) and (b) a variety of issues relating to *de facto* control in factual settings that do not implicate the provisions of section 310(b)(4). *In the Matter of Orion Satellite Corporation*, Memorandum Opinion, Order and Authorization, 5 FCC Rcd 4937, 4939, para 18 n.26 (1990) (*Orion*) (allowing transaction not covered under section 310(b)(4), based on compliance with broadcast attribution rules to ensure that aliens were adequately insulated from day-to-day business and policy decisions of partnership); *In the Matter of Spanish International Communications Corp.*, MM Docket Nos. 83-540 to 83-544, 84-380 to 84-834, Memorandum Opinion and Order, 2 FCC Rcd 3336, 3338-40 (1987) (considering whether stations were under alien control based on historic ties between the alien and the licensees, the ownership structure of the licensee and boards of directors, the station’s day-to-day management and control over programming); *Channel 31, Inc., Debtor-in-Possession*, Letter, FCC 79-164 (rel. Mar. 15, 1979) (considering whether Canadian corporation had acquired *de facto* control of licensee through conversion rights and long term contract even though corporation’s stock only amounted to 20 percent); *see also Telemundo v. FCC*, 802 F.2d 513, 516 (1986) (noting that “[E]ven in instances in which the technical statutory requirements are met, the Commission may still find that aliens exercise an effective control over the operations of a station that is contrary to statutory policy.”).

<sup>143</sup> Senator Hollings Comments at 4-8; Novaxess Comments at 4-5 (arguing that the German government heavily influences DT); QSC Comments at 8-9 (arguing that the German government is “deeply intertwined” with DT); Letter from Michael Noll to William E. Kennard, Chairman, Federal Communications Commission (filed Nov. 20, 2000 (arguing that aliens or their representatives are not to be granted licenses).

<sup>144</sup> *QVC Network, Inc.*, Memorandum Opinion and Order, 8 FCC Rcd 8485, 8490-91 para. 21 (1993); *see Fox I*, 10 FCC Rcd 8452, 8522, para. 175; *The Seven Hills Television Company*, Decision, 2 FCC Rcd 6876, 6886, paras. 63-65 (Rev. Bd. 1987); *Russell G. Simpson*, Letter, 2 FCC 2d 640 (1966); *cf. Noe v. FCC*, 260 F.2d 739, 741 (D.C. Cir. 1958) (finding that section 310(a) did not apply to Loyola University’s relationship to the Society of Jesus).

non-government, alien ownership of a licensee.<sup>145</sup> Because this broader interpretation of the term “representative” proposed by some commenters is inconsistent with the text of sections 310(a) and 310(b) and Commission precedent, we decline to adopt it.

48. The Commission has been guided in its interpretation and application of the foreign ownership restrictions in sections 310(a) and (b) by Congress’s balancing in 1934 of concerns about national security against the benefits of allowing foreign investment, both creating a more competitive market for American consumers and avoiding retaliation against U.S. investment in foreign markets.<sup>146</sup> The public interest provisions of the Act allow the Commission to examine this balance and reach a conclusion based on the particular facts in cases involving indirect control of licensees by a foreign government. In this case, for example, section 310(b)(4) allows the Commission to take into account the potential adverse impacts of prohibiting indirect ownership and control in this case (e.g., lost domestic competition and international retaliation) at a time when the structure of international competition in telecommunications markets is at least as critical to U.S. consumers and businesses as it was in 1934.<sup>147</sup> Therefore, we confirm that the language in section 310(b)(4) permits the Commission, without implied limitation, to find that the public interest would not be served by denying indirect foreign government ownership that amounts to control of a licensee.

### C. Section 310(b)(4) Framework

49. In Parts IV-V below, we consider the facts of this case pursuant to our public interest analysis under section 310(b)(4) of the Act. After DT’s acquisition of VoiceStream and Powertel, the German government, either directly or through KfW, its nominee, will own approximately 45 percent of DT’s stock.<sup>148</sup> Total non-U.S. ownership of DT (i.e., ownership by the German government, aliens and foreign corporation) will amount to approximately 77 percent.<sup>149</sup> Thus, both the German government’s holdings and the total non-U.S. holdings post merger will exceed the 25-percent benchmark set forth in section 310(b)(4). In addition, DT is a foreign corporation and its holdings will exceed the 25-percent benchmark. We must therefore examine whether denying such levels of alien, foreign government, and foreign corporate ownership would be consistent with the public interest.

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<sup>145</sup> Senator Hollings Comments at 8.

<sup>146</sup> As discussed above, Congress ultimately declined to adopt an absolute prohibition on indirect foreign control. Congress also rejected the Navy’s suggestion to flatly prohibit foreign indirect ownership over 25 percent for national security reasons, in part out of fear of foreign retaliation and the threat to free trade. *1934 Senate Hearings* at 123.

<sup>147</sup> *Foreign Participation Order*, 12 FCC Rcd at 23894, para. 4 (U.S. companies allowed to enter previously closed foreign markets and develop competing networks for local, long distance, wireless and international services).

<sup>148</sup> See *supra* Part I.A.2 discussing the German government ownership of DT.

<sup>149</sup> See Applicants March 12 *Ex Parte* Letter at 2.

50. In making this public interest determination, we first analyze whether, as some commenters have alleged, there are special risks to competition in the United States associated with the German government's partial ownership of DT. We also determine whether DT's control of the licenses at issue raises concerns relating to national security, law enforcement, and public safety.<sup>150</sup> Finally, in Part V, *Alleged Harms to Competition in Specific U.S. Markets*, we examine and reject claims—analytically distinct from the allegations regarding DT's partial government ownership—that, as the dominant carrier in Germany, DT has access to monopoly profits and through predatory pricing or other methods of leveraging its dominance in Germany would gain an unfair competitive advantage for its U.S. operations.

#### IV. ALLEGED HARMS ASSOCIATED WITH FOREIGN GOVERNMENT OWNERSHIP

51. In the *Foreign Participation Order*, the Commission set forth the standards for analyzing competitive concerns resulting from foreign participation in U.S. telecommunications markets.<sup>151</sup> The Commission found that applying an “open entry” standard under section 310(b)(4) to indirect foreign ownership in licensees involving WTO Members, in conjunction with enhanced safeguards and WTO Members' commitments to liberalize and privatize their markets, would better achieve its pro-competition goals.<sup>152</sup> The Commission therefore removed the previous Effective Competitive Opportunities (ECO) test

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<sup>150</sup> *Foreign Participation Order*, 12 FCC Rcd at 23940-41, para. 113 and at 23919, paras. 61-62; see also *Foreign Government Ownership of American Telecommunications Companies*, Hearing Before the Subcomm. on Telecommunications, Trade, and Consumer Protection of the House Comm. on Commerce, 106<sup>th</sup> Cong. 2d Sess. (Sept. 7, 2000) (testimony of William E. Kennard regarding Commission interaction with Executive Branch and ability of the Department of Justice and the Commission to address satisfactorily national security concerns associated with foreign ownership of U.S. telecommunications carriers). In practice, the Commission accords deference to the expertise of Executive Branch agencies with respect to these concerns in making its public interest determinations. See, e.g., *In the Matter of AT&T Corp., British Telecommunications, Plc, VLT Co. L.L.C., Violet License Co. L.L.C., and TNV [Bahamas] Limited Applications for Grant of Section 214 Authority, Modification of Authorizations and Assignment of Licenses in Connection with the Proposed Joint Venture between AT&T Corp. and British Telecommunications, Plc*, IB Docket No. 98-212, Memorandum Opinion and Order, 14 FCC Rcd 19140, 19197-218, App. B, Agreement on National Security Issues (1999); *In re Applications of VoiceStream Wireless Corp.*, Memorandum Opinion and Order, 15 FCC Rcd 3341, 3366-81, App. A, DOJ/FBI Agreement (2000).

<sup>151</sup> See generally *Foreign Participation Order*, 12 FCC Rcd at 23894, para. 4. In the *Foreign Participation Order*, the Commission determined that U.S. consumers and companies would reap tangible benefits from the removal of obstacles to entry into all telecommunications service markets, including those entry barriers that exist in the U.S. market. *Id.* at 23894-95, paras. 4-5. The Commission concluded that in light of market access commitments undertaken by WTO members, as well as the Commission's increasingly more deregulatory framework, it served the public interest to take steps, in parallel with the United States's major trading partners, to ease requirements for entry by foreign companies into the U.S. market. *Id.* at 23983-94, para. 2. The Commission observed that the WTO commitments would create obligations on foreign governments to allow U.S. companies to enter previously closed foreign markets and to develop competing networks abroad for local, long distance, wireless, and international services. *Id.* at 23894, para. 4. Likewise, the Commission reasoned that additional foreign investment in the U.S. market would promote further competition and result in substantial benefits to U.S. consumers, including lower prices for existing services and greater service innovation. *Id.* at 23896-97, para. 10.

<sup>152</sup> *Foreign Participation Order*, 12 FCC Rcd at 23897-98, para. 13.



from the public interest analysis in making section 310(b)(4) determinations with respect to WTO Members.<sup>153</sup> The Commission replaced the ECO test with a rebuttable presumption in favor of entry for applicants from WTO Members.<sup>154</sup> In adopting this presumption as a factor in its public interest analysis, the Commission made no distinction between government and private foreign ownership.

52. Several commenters, including the United States Chamber of Commerce and the European Union, argue that construing section 310 to absolutely prohibit indirect foreign government control could lead to retaliation and might be inconsistent with the United States' foreign trade obligations under the

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<sup>153</sup> *Id.* The ECO test required, as a condition of foreign carrier entry into the U.S. market, that there be no legal or practical restrictions on U.S. carriers' entry into the foreign carrier's market. See *Market Entry and Regulation of Foreign Affiliated Entities*, IB Docket No. 95-22, Report and Order, 11 FCC Rcd 3873, 3877, para. 6 (1995) (*Foreign Carrier Entry Order*).

<sup>154</sup> *Foreign Participation Order*, 12 FCC Rcd at 23913, para. 50 (applying standard to applications for section 214 authority, as well as for approval under section 310(b)(4)). We note that several of DT's German competitors urge the Commission not to apply this rebuttable presumption to the DT Transfer Applications. See Novaxess Comments at 3-4; QSC Comments at 10-11. Specifically, these commenters argue that (i) the *Foreign Participation Order* did not abolish the ECO test and only contemplated using the open entry presumption in routine cases as a single factor in the public interest analysis; (ii) the Commission should not "[u]nthink[ly] [apply] the presumption to the German local access market in which a dominant, government-controlled ex-monopolist maintains its stranglehold on competition and is keeping U.S. and other telecommunications carriers from [entering the market.];" (iii) the distinction between WTO and non-WTO Members should not apply to global players like DT; (iv) the Commission's assumptions about competition in WTO member countries do not hold true for Germany and DT, especially given the increasingly global market for roaming services which was unforeseen at the time the *Foreign Participation Order* was adopted; and (v) the *Foreign Participation Order* did not specifically address foreign government ownership. Novaxess Comments at 3-4; QSC Comments at 10-11.

These commenters essentially seek further reconsideration of the *Foreign Participation Order*. Even if such requests were timely, many of their arguments were considered and rejected in the original Order and the subsequent Order on Reconsideration; the remaining arguments simply misinterpret the foreign entry policies the Commission adopted in 1997. First, the Commission in 1995 considered the possibility that a foreign carrier may operate in multiple markets and decided to conduct its analysis pursuant to section 310(b)(4) by reference to a single "home market" for a carrier. See *Foreign Carrier Entry Order*, 11 FCC Rcd at 3949, para. 201; *Foreign Participation Order*, 12 FCC Rcd at 23941, para. 116. The Commission retained this "home market framework" when it adopted the rebuttable presumption favoring market entry by carriers with indirect ownership from WTO members. Second, contrary to commenters' claims, the Commission expressly eliminated the ECO test for WTO Members. *Foreign Participation Order*, 12 FCC Rcd at 23897, para. 13 (noting that "[o]ur rules will no longer require applicants from WTO members to demonstrate that their markets offer 'ECO'") and 23896, para. 9 (removing the ECO test and replacing it with an open entry standard, without making any distinction between routine or non-routine applications). In fact, in the *Foreign Participation Order*, the Commission declined a similar request from AT&T to continue to evaluate whether an applicant's country provides unrestricted market access and satisfies its market opening commitments. *Id.* at 23905-07, paras. 32, 36-37. Our open entry policy does not distinguish among WTO Members, and is not premised, as commenters conclude, on an analysis of actual conditions of entry in a foreign market. The Commission instead relies on the increase in global competition coupled with dominant carrier safeguards to protect competition in U.S. markets. We note that, to the extent that a WTO member fails to fulfill its WTO obligations, these are trade violations that can be addressed through the WTO dispute resolution process.

WTO Basic Telecom Agreement.<sup>155</sup> We note that our interpretation harmonizes the statutory language, Congressional and Commission policy, and the U.S. obligations under the WTO.<sup>156</sup>

53. While acknowledging the benefits of increased foreign participation in the U.S. telecommunications marketplace, the Commission has remained sensitive to its responsibility to promote U.S. competition and to protect national security and other interests raised by the Executive Branch in reviewing proposed foreign ownership. As to competition, the Commission stated in the *Foreign Participation Order* that the commitments made by WTO Members, the Commission's regulatory safeguards, and antitrust laws should, collectively, address competitive concerns resulting from foreign participation by carriers from WTO Members in U.S. telecommunications markets.<sup>157</sup> Nevertheless, the Commission has acknowledged the possibility that entry by a foreign carrier might under some circumstances be so detrimental that the standard competitive safeguards would be ineffective.<sup>158</sup> In such a case, the Commission has made clear that it would impose conditions on an authorization, or where an application poses a "very high risk to competition" in the U.S. market that cannot be addressed by such conditions, deny an application.<sup>159</sup>

54. Several commenters argue that the German Government's ownership in DT will increase DT's ability to harm competition in U.S. markets.<sup>160</sup> They allege that government ownership may permit an entity to acquire capital at an artificially low cost or permit it to engage in predatory behavior by subsidizing its entry into U.S. markets through supra-competitive pricing or cost misallocation in its foreign market if there is lax or discriminatory regulatory oversight.<sup>161</sup> Commenters further argue that the Applicants will

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<sup>155</sup> See, e.g., European Union Delegation of the European Commission, Note Verbale, at paras. 9-16 (filed Jan. 25, 2001); Chamber of Commerce at 5.

<sup>156</sup> *Weinberger v. Rossi*, 456 U.S. 25, 30-32 (1982) (quoting *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)) (construing treaties to include executive agreements).

<sup>157</sup> *Foreign Participation Order*, 12 FCC Rcd at 23905-09, paras. 33-41. For example, the Commission's regulatory safeguards include the "No Special Concessions" rule, 47 C.F.R. § 63.14, which prohibits U.S. carriers from entering into exclusive arrangements with foreign carriers that possess sufficient market power in a relevant market on the foreign end of the route to affect competition adversely in the U.S. market. Similarly, dominant carrier safeguards contained in rule 63.10 apply to U.S. carriers affiliated with foreign carriers with market power. 47 C.F.R. §§ 63.10, 63.14.

<sup>158</sup> *Foreign Participation Order*, 12 FCC Rcd at 23914, para. 52.

<sup>159</sup> *Id.*

<sup>160</sup> See, e.g., Novaxess Comments at 10-11; Senator Hollings Comments at 2.

<sup>161</sup> CCIA Comments at 2; Novaxess Comments at 12; Senator Hollings Comments at 10-11. The Computer and Communications Industry Association further argues that in a competitive environment, no business should be subjected to "the specter of competing with a concern that is buttressed with the 'deep pockets' or the regulatory authority of a government that can promote or protect its parochial ownership interest without regard to ordinary market forces." See CCIA Comments at 3; see generally Attachment to CCIA Comments, Joseph E. Stiglitz, et al., *The Role of Government in the Digital Age* (Oct. 2000).

have extraordinary access to financial resources; will be more likely to engage in anti-competitive behavior because of favorable regulatory treatment of DT in Germany; and will possess additional advantages not enjoyed by competitors in the U.S. marketplace because of the Applicants' special relationship with the German Government.<sup>162</sup>

55. We address each of these concerns below and conclude that DT's German government ownership does not confer any unique advantages that are likely to pose a risk to competition in the U.S. telecommunications market.<sup>163</sup> We note further that after careful review and analysis of the proposed transaction (including the recognition that foreign government ownership of a party to a specific merger may be relevant to the analysis of the merger's competitive effect in some circumstances), the Antitrust Division of the Department of Justice concluded that the limited vertical integration resulting from the proposed transaction would not be likely to substantially lessen competition in violation of the antitrust laws.<sup>164</sup>

#### A. Foreign Government Control of DT

56. As a threshold matter, several commenters contend that the proposed transaction violates section 310(a) because it would result in the German government having *de facto* control over the corporations that hold the licenses. As explained above, the existence of such *de facto* control would not result in an absolute prohibition under section 310(a). Nevertheless, the existence and degree of control by the German government is relevant along with other factors in determining the public interest under section 310(b)(4). We therefore begin with an examination of the degree of control the German government will have over DT.

57. DT's German competitors and other commenters specifically allege that the German government will control DT because the government could exercise its shareholder rights to elect members of the Supervisory Board of Directors, which ultimately affects the appointment of the company's top managers and determines its strategy.<sup>165</sup> DT's Supervisory Board, which is the upper tier of a German corporation's two-tier board structure, consists of twenty individuals, ten of whom are elected by shareholder vote and ten by representatives of the employees' unions.<sup>166</sup> The commenters note that after the

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<sup>162</sup> See, e.g., CCIA Comments at 2; Novaxess Comments at 12, Senator Hollings Comments at 10-11.

<sup>163</sup> See *supra* Part V for an analysis of DT's entry into the domestic mobile telephony markets, U.S. international services market, and the market for the provision of global wireless services.

<sup>164</sup> See Department of Justice Sept. 14 Letter at 1-2 (noting that foreign government ownership may be relevant if such government ownership is likely to increase the existence or durability of market power in a foreign market and if the facts indicate that the merger would subsequently enable and increase the likelihood that the party would leverage that market power to injure U.S. competitors and consumers).

<sup>165</sup> Senator Hollings Comments at 5; Novaxess Comments at 5-7; GTS Comments at 8-9.

<sup>166</sup> VoiceStream Powertel DT Reply at 38-39; Applicants Feb. 9 Response to Supplemental Information Request at 8-9.

merger, the German government will retain a voting interest in DT of approximately 45 percent, while no other shareholder will own more than five percent of DT.<sup>167</sup> Therefore, commenters allege, as DT's largest shareholder, the German government will effectively retain the ability to name as many of the ten shareholder-appointed members of the Supervisory Board as it chooses, and thereby dominate the management of DT.<sup>168</sup> Commenters also allege that the German government meets regularly with DT officials to direct its activities.<sup>169</sup> Finally, comments state that the government loan guarantees and the fact that most of DT's workforce is former civil service employees are important indicia of control.<sup>170</sup>

58. The Applicants respond that after the merger, the German government will not control DT's management or operations and that DT does not act on behalf of the German government.<sup>171</sup> Although the government has the right to appoint ten members of DT's Supervisory Board, the Applicants argue that

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<sup>167</sup> GTS Comments at 8-9; *see also* Applicants Feb. 9 Response to Supplemental Information Request at 13.

<sup>168</sup> GTS Comments at 8-9. Under these circumstances, nearly all of DT's other shareholders would have to vote collectively to block the German government from pursuing any particular strategy. We note in this regard that the Applicants have not committed to limit the number of Supervisory Board members that the German government would appoint after the merger. If the German government could control the composition of the Supervisory Board, it would be able to control the Managing Board and thus arguably dominate the management of DT. Finally, we note that the German government will also have the ability to exercise negative control in limited circumstances by using its votes potentially to block certain transactions that require a supermajority of shareholder votes. *See generally* German Stock Corporation Act (Aktiengesetz) §§ 52, 103, 129(1), 141, 179, 179a, 182, 186, 193, 212, and 262 (requiring an affirmative shareholder vote of 75 percent for, *inter alia*, approval of mergers, sale of substantially all the corporation's assets and dissolution).

<sup>169</sup> Senator Hollings Comments at 5-6; Novaxess Comments at 4-7; GTS Comments at 8-9.

<sup>170</sup> Novaxess Comments at 5-6; Senator Hollings Comments at 6-7. These comments also emphasize the fact that the German Finance Ministry determined that DT's contributions to the German Slave Labor Fund, a foundation established to compensate the victims of Nazi-era forced and slave laborers, would be classified as state or government contributions rather than as private corporate contributions. Senator Hollings Comments at 8.

<sup>171</sup> VoiceStream Powertel DT Reply at 37-41. The Applicants also contend, on the basis of the six *Intermountain* factors, that after the merger has been consummated the German government will not have the ability to exercise *de facto* control. VoiceStream Powertel DT Reply at 39-41. Admittedly, the Commission has sometimes examined the six factors identified in the 1963 *Intermountain Microwave* decision to determine whether a party has *de facto* control. *Applications for Microwave Transfers (from Intermountain Microwave) to Teleprompter Approved with Warning*, Public Notice, 12 F.C.C. 2d 559-60 (1963) (*Intermountain*) (noting that "[t]he normal minimum incidents of such interest include the unfettered use of all facilities and equipment used in connection therewith; day to day operation and control; determination of and the carrying out of policy decisions,...; employment, supervision, and dismissal of personnel; payment of financial obligations,...; and the receipt of moneys and profits derived from the operation of the ...facilities"). *Intermountain* involved an unauthorized transfer of control and thus the *Intermountain* factors focus on control of day-to-day operations and other matters directly affecting control of the licensee. The circumstances of this case are somewhat different; we are concerned with whether the German government has *de facto* control of the licensees' ultimate holding corporation—DT. Therefore, we believe that the instant transaction is factually distinct from *Intermountain* and that a totality of the circumstances test would be the more appropriate standard.

to date the Government and its nominee have only appointed two members. In addition, the Applicants state that the German government historically has always voted in line with the majority of the other shareholders.<sup>172</sup> The Applicants further contend that the Government's guarantee of DT's pre-privatization loans and the civil service-like benefits that some of DT's employees receive are simply by-products of DT's former status as a government entity.<sup>173</sup>

59. As the Commission has previously stressed, "there is no exact formula for determining control and ... questions of control turn on the specific circumstances of the case...[t]hus...we examine the totality of the circumstances."<sup>174</sup> In this case, however, we need not decide this contentious issue. Assuming *arguendo* that post-merger the German government would control DT, we find, as explained below, that the German government's ownership of DT does not confer unique financial advantages or otherwise create a high risk to competition or consumers in the United States that warrants special conditions.

## **B. Foreign Government Ownership and Possible Financial Advantages**

### **1. Preferential Access to Capital and Government Subsidies**

60. First, we disagree with arguments that DT enjoys special financial advantages because its government ownership could be used to anti-competitively cross-subsidize operations in U.S. and global markets. Specifically, commenters argue that the proposed transaction will give the Applicants a "virtually unlimited supply of capital" through favorable interest rate terms reflecting a lower risk of defaulting, or through loan guarantees or special subsidies.<sup>175</sup> For example, Novaxess contends that because the German

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<sup>172</sup> VoiceStream Powertel DT Reply at 38.

<sup>173</sup> *Id.* at 41-43; Applicants Feb. 9 Response to Supplemental Information Request at 7 (noting that 97 percent of DT's guaranteed debt will be paid off by 2004). The Applicants also note that DT's contribution to the German Slave Labor Fund was categorized as a government contribution simply to reflect the German government's status as a majority shareholder. VoiceStream Powertel DT Reply at 43-44.

<sup>174</sup> *In re Application of Ellis Thompson Corporation*, Memorandum Opinion and Order and Hearing Designation Order, 9 FCC Rcd 7138, 7139, para. 10 (1994); *see also In re Application of Baker Creek Communications, L.P.*, Memorandum Opinion and Order, 13 FCC Rcd 18709, 18715 para. 9 (Wir. Tel. Bur. 1998) ("...the power to control is a fact-based inquiry with no precise formula for evaluating all factors.").

<sup>175</sup> Senator Hollings Comments at 6 (German government ownership allows DT to attract capital easily because lenders are aware that the government as DT's principle shareholder will back its debts); QSC Comments at 15-16 (advantageous access to capital has allowed DT to increase its accumulated debt more than a privatized firm would be able to, as well as bid for German UMTS licenses); *see also* UTStarcom Comments at 1; WITCO Petition to Deny at 5; Novaxess Comments at 7 and Annex A, Testimony of Andrew D. Lipman on behalf of VATM, the German Competitive Carrier Association, before the Subcommittee on Telecommunications, Trade, and Consumer Protection, Commerce Committee, U.S. House of Representatives, *Foreign Government Ownership of American Telecommunications Companies*, Sept. 7, 2000, at 13-14 (VATM Testimony).

government is DT's principal shareholder, it will ensure payment of DT's liabilities, allowing DT to increase its debt to a greater extent than a privatized firm would be able to do.<sup>176</sup>

61. The Applicants acknowledge that certain debt acquired by DT prior to its privatization in 1995 is guaranteed by the German government.<sup>177</sup> We are not persuaded, however, that this perceived benefit increases the likelihood that the Applicants will engage in anti-competitive behavior and harm competition in the United States. The record indicates that the German government does not guarantee debt incurred by DT subsequent to the company's privatization in 1995;<sup>178</sup> that DT has paid off approximately half of the guaranteed debt;<sup>179</sup> and that, pursuant to a payment schedule, DT expects to pay most of the balance by 2004.<sup>180</sup> Therefore, to the extent that, in the case of default, past loan guarantees increase the likelihood of payment of unguaranteed debts, thereby lowering DT's cost of capital, any benefit from the government guarantee of prior debts is limited, both in amount and duration.<sup>181</sup>

62. The record also indicates that partial government ownership in DT does not otherwise lower DT's cost of capital or create other advantages in financial markets. Indeed, commenters note that DT and other foreign companies with government ownership may be at a competitive disadvantage: government-owned firms typically are less efficient and less profitable and may have obligations such as high labor costs and extensive universal service requirements.<sup>182</sup> These factors may especially disadvantage DT and other foreign companies when they seek to expand abroad into competitive markets like the United States, where efficiency is such a key determinant of success.<sup>183</sup> Equity investors may judge that these

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<sup>176</sup> Novaxess Comments at 7.

<sup>177</sup> VoiceStream DT Application at 39 n.118.

<sup>178</sup> VoiceStream Powertel DT Reply at 11 (asserting that the comments regarding DT's practices in Germany are exaggerated and misleading). *See also* Sidak Declaration at paras. 22-26. The Applicants also note that debts DT incurred after January 2, 1995 are not guaranteed by the German government. VoiceStream DT Application at 38-39; *see* Letter from Andreas Tegge, Managing Director, Deutsche Telecom Inc., to Ari Fitzgerald, Deputy Chief, International Bureau, Federal Communications Commission, IB Docket No. 00-187 at 2 (filed Nov. 17, 2000) (DT Nov. 17 *Ex Parte* Letter).

<sup>179</sup> VoiceStream DT Application at 39 n.118.

<sup>180</sup> *See* Applicants Feb. 9 Response to Supplemental Information Request at 7. In 2005, only 3.0 percent of the guaranteed debt will remain. *Id.*

<sup>181</sup> "Cost of capital" refers to the annual rate of return that a firm must pay for its combination of debt (*e.g.*, funds raised through bonds) and equity (*e.g.*, common stock). The MIT Dictionary of Modern Economics 85 (4<sup>th</sup> ed. 1997).

<sup>182</sup> Fisher Testimony at 8; *see infra* Part IV.C discussing strategic trade policy concerns.

<sup>183</sup> Fisher Testimony at 8. Compared to fully privatized firms, DT has expensive labor obligations. A few commenters note that DT employees tenured prior to DT's privatization receive special protections pursuant to Article 143b of the German Basic Law. QSC Comments at 12 n.24; Senator Hollings Comments at 7. We find that the civil servant status of these DT employees does not confer any financial advantages to the Applicants and may in (continued....)

negative factors counter-balance or completely outweigh the positive impact of loan guarantees on the risk-level of an investment. If so, partial government ownership may have a negligible, or possibly even negative, effect on the cost of capital.

63. Based on evidence regarding the cost of capital and credit ratings, as well as the labor and civil service obligations discussed above, we find that the German governments' partial ownership in DT does not provide DT with easier access to capital than the major incumbents in U.S. markets. For example, the evidence regarding DT's weighted average cost of capital (WACC)—the cost of debt and equity combined—reveals that DT's cost of capital is higher than that of its competitors. According to one of the commenters, DT's WACC is 11.7 percent, which is higher than the WACCs of SBC (10.8 percent), Sprint (10.1 percent), AT&T (9.8 percent), Verizon (8.7 percent), and BellSouth (8.6 percent), all of which are large, privately held carriers.<sup>184</sup>

64. Furthermore, DT does not enjoy a higher bond rating than other large, but fully-privatized telecommunications carriers.<sup>185</sup> Bond ratings affect cost of capital by influencing the interest rate at which a firm can obtain long-term debt, a key component of the cost of capital. High bond ratings mean that lenders face less risk of default by the borrower, thereby resulting in lower interest rates. Although the German government enjoys the highest bond rating of AAA (Standard & Poor's), DT is only rated at A-, which is a lower rating than SBC (AA-), Verizon (A+), British Telecom (A), and AT&T (A), all of which are large, privately-held carriers.<sup>186</sup> Both Standard & Poors and Moody's downgraded DT's credit rating subsequent to DT's most recent bond issue in June of 2000,<sup>187</sup> and Moody's has placed DT under review for a possible

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fact pose considerable costs because of the larger required contributions to these employees' pensions. *See* Applicants Feb. 9 Response to Supplemental Information Request at 4 (noting that DT is required by law to contribute an amount equal to 33 percent of the civil servants' total income toward pensions, compared to a contribution for all other employees equal to approximately 11 percent of their total income).

<sup>184</sup> Sidak Declaration at para. 32, Table 2, Weighted Average Cost of Capital (WACC) for Major Telecommunications Companies.

<sup>185</sup> In fact, the record does not establish a systematic relationship between bond ratings and the extent of government ownership in a firm. Some credit agencies, like equity investors, cite government ownership as a negative or minus factor. For example, according to material submitted by the Applicants, Moody's recent rating of Telstra, the Australian government-owned carrier, expressly attributed Telstra's inability to access equity markets to its 50.1 percent government ownership. Fisher Testimony at 7 n.4.

<sup>186</sup> Sidak Declaration at paras. 27-28 (citing Standard & Poor's ratings obtained from Standard & Poor's New York Ratings Desk at (212) 438-2400 on Jan. 2, 2001; Moody's ratings obtained from Moody's New York Rating Desk at (212) 553-0377 on Jan. 2, 2001) (Ratings obtained from the Standard & Poor's New York Ratings Desk and the Moody's New York Ratings Desk on April 24, 2001, remain consistent with the ratings cited herein.) We also find insufficient evidence in the record to conclude, as Novaxess urges, that DT's current rating reflects the financial backing of the German government. *See* Novaxess Comments at 7.

<sup>187</sup> Sidak Declaration at para. 28.

further downgrade to its credit rating, as a result of its \$7 billion pledge for third-generation wireless licenses in Germany and its \$50 billion offer for VoiceStream.<sup>188</sup>

65. DT's government ownership does not appear to confer any other financial advantages. Under German and European Union (E.U.) law, DT cannot receive discriminatory tax benefits, subsidies, or state aid. E.U. law prohibits "any aid granted by a member state or through state resources in any form whatsoever which distorts or threatens to distort competition" by favoring certain companies.<sup>189</sup> Moreover, the European Commission, in cooperation with the German government, is expressly required to keep any such system of state aid "under constant review" and may initiate enforcement proceedings if it finds a system of state aid to be incompatible with the common market.<sup>190</sup> We therefore conclude that there is no basis to find that DT has easier access to capital than the major incumbents in U.S. markets, much less an advantage that is so great that it would enable DT to act anti-competitively in U.S. markets.

## 2. Possible Favorable Regulatory Treatment

66. Contrary to arguments raised in the record, we also find remote the possibility of discriminatory regulatory treatment in the German market sufficient to enable DT to finance anti-competitive behavior in U.S. markets. To the extent such a possibility exists, it does not rebut the presumption favoring investment by WTO Member countries, articulated in the Commission's *Foreign Participation Order*.<sup>191</sup>

67. Several commenters contend that DT's German government ownership has created a "tangled" relationship between DT and the German regulator, Regulatory Authority for Telecommunications and Posts (RegTP), which was created pursuant to the German Telecommunications Act.<sup>192</sup> Specifically, DT's German competitors allege that (i) DT receives favorable and discriminatory treatment from RegTP in light of the government's financial interest in DT; (ii) RegTP does not enforce existing regulations;<sup>193</sup> (iii) RegTP does not act independently because other parts of the German Government are able to dictate RegTP's policies;<sup>194</sup> and (iv) current regulation is inadequate to foster

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<sup>188</sup> Fisher Testimony at 7.

<sup>189</sup> Consolidated Version of the Treaty Establishing the European Community, Art. 87(1) (ex Art. 92(1)).

<sup>190</sup> *Id.*, Art. 88 (ex Art. 93).

<sup>191</sup> See *Foreign Participation Order*, 12 FCC Rcd at 23913, para. 50; see also *supra* Part IV discussing the Commission's standard for entry by foreign carriers.

<sup>192</sup> QSC Comments at 4; VATM Testimony, *supra* note 175 at 12-13; GTS Comments at 9; KKF Comments at 2; Broadnet Comments at 2; NetCologne Comments at 2; Senator Hollings Comments at 11.

<sup>193</sup> QSC Comments at 20-22; VATM Testimony, *supra* note 175 at 6-7, 18-21, 24-25, 27; see also VATM Testimony, *supra* note 175, App. 2, Propositions Regarding the Competitive and Regulatory Situation in the German Telecommunications Market, at 8-9 (VATM Propositions); WITCO Petition to Deny at 6; GTS Comments at 13, 15;

<sup>194</sup> VATM Testimony, *supra* note 175 at 12-13, 26, 30; GTS Comments at 15, 22; Novaxess Reply at 3-5.



competitive markets.<sup>195</sup> According to these commenters these advantages could be exploited to improve the Applicants' market position and distort competition in the U.S. market.<sup>196</sup> A coalition of DT's German competitors, the German Competitive Carrier Association (VATM)<sup>197</sup> also has made numerous allegations that the German government is highly protectionist of DT and suppresses competition in the German marketplace through political influence, as evidenced by what these competitors perceive as RegTP's unwillingness to initiate enforcement or take aggressive policy stands.<sup>198</sup> Commenters also express concern about a guidance paper released by the Ministry of Economics and Technology that they fear may reduce the effectiveness of RegTP and the premature release of DT from its dominant carrier obligations in Germany which they believe would result in anti-competitive behavior.<sup>199</sup> Moreover, VATM argues that the U.S. Trade Representative (USTR) has been unsuccessfully seeking to address these concerns with the German government.<sup>200</sup> Therefore, they request that the Commission condition any grant of the DT Transfer Applications on competition commitments relating to the German market.<sup>201</sup>

68. We recognize the dispute in the record regarding the efficacy of RegTP in promoting competition in the German telecommunications market. For example, VATM claims that RegTP has "adopted an overly passive and accommodating stand on issues such as [DT]'s predatory pricing."<sup>202</sup> The

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<sup>195</sup> QSC Comments at 22, 24-25; VATM Testimony, *supra* note 175 at 17-18, 26-29; VATM Propositions, *supra* note 193 at 7-9; WITCO Petition to Deny at 6; GTS Comments at 14-15, 20-21.

<sup>196</sup> See, e.g., QSC Comments at 4; WITCO Petition at 5.

<sup>197</sup> VATM, Verband der Anbieter von Telekommunikations- und Mehrwertdiensten e.V., represents more than 50 telecommunications and multimedia companies that have entered the German market in competition with DT. Many of VATM's members are financed, operated, or controlled by U.S. interests. VATM Testimony, *supra* note 175 at 5.

<sup>198</sup> Specifically, the VATM testimony cites concerns about the possible lack of transparency in RegTP's decision-making and persistent difficulties in obtaining interconnection and collocation from DT in Germany. VATM Testimony, *supra* note 175 at 24, 2, 11-12.

<sup>199</sup> See, e.g., KKF Comments at 2; GTS Comments at 10 and Exh. C, Position Paper of the Federal Ministry of Economics and Technology (BMWi) on *Competition on the Telecommunications and Post Markets*, at 4-6 (Position Paper of the Federal Ministry of Economics). We note that, in response, the Applicants state that the Position Paper is a "nonbinding" discussion paper that merely affirms that significant competitive growth in certain markets, particularly the international market, points in the direction of possible price deregulation in the future. VoiceStream Powertel DT Reply at App. A, 3.

<sup>200</sup> VATM Testimony, *supra* note 175 at 6.

<sup>201</sup> Novaxess Comments at 2 (requesting that the Commission impose conditions necessary to pry open the German market to further competition, including specific commitments by German regulators); VATM Testimony, *supra* note 175 at 6; QSC Comments at 2-3 (noting that "the gap between market opening commitments and marketplace realities yawns wide" and requesting appropriate conditions).

<sup>202</sup> VATM Testimony, *supra* note 175 at 6, 12-13 (questioning the independence of RegTP and its ability to effectively regulate DT).

Applicants counter that, as is occurring in many developed economies, the German telecommunications market is undergoing liberalization, in which DT is being challenged by new competitors. While we acknowledge that both the German Telecommunications Act and Germany's liberalization and privatization commitments under the WTO Agreement require the independence and transparency of RegTP's decisionmaking, under the *Foreign Participation Order* we focus our analysis on the competitive effects of DT's entry on U.S. markets.

69. As we discuss in greater detail below, the likelihood of the Applicants engaging in predatory behavior in U.S. markets because of DT's position in the German market is low.<sup>203</sup> Predatory tactics work only in markets in which incumbents and entrants are financially weak and/or have poor access to capital markets. Otherwise, a predator cannot succeed in driving out and keeping rivals out of the market. Because the U.S. wireless and U.S. international markets are characterized by strong incumbents and potential entrants with access to the world's deepest capital markets, predation is highly unlikely to be a sustainable strategy, even if DT did receive favorable regulatory treatment in Germany.<sup>204</sup>

70. Moreover, the Commission has recognized that USTR, as the Executive Branch agency that negotiates and enforces U.S. trade laws and rights under international agreements, is responsible for responding to complaints and bringing disputes regarding alleged violations of WTO commitments by trading partners that do not affect competition in domestic U.S. markets.<sup>205</sup> We recognize that USTR, in its most recent report regarding its annual Section 1377 review, has noted progress in Germany with respect to Germany's compliance with its trade obligations, but USTR also recognizes the need for additional progress and maintains a focus on the activities of the German regulator.<sup>206</sup>

### C. Strategic Trade Policy Concerns

71. We also find no reason to conclude, as certain commenters argue, that the German government, through its partial ownership of DT, will choose to promote or protect its ownership interest

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<sup>203</sup> See *infra* Part V.A (concluding that predation would likely fail in the U.S. domestic wireless markets). We note that the Department of Justice has previously reached the same conclusion in conducting its review pursuant to the Clayton Act. See Department of Justice Sept. 14 Letter at 2.

<sup>204</sup> See *supra* Part V.A discussing predation.

<sup>205</sup> *Foreign Participation Order*, 12 FCC Rcd at 23908, para. 39; Statement of the Honorable Michael Kantor at 7 (Kantor Statement); OII Comments at 2; Callahan Comments at 1. We note that under GATS Article XXII, any WTO Member may initiate a dispute settlement if it believes that another Member has failed to carry out its obligations and commitments. *Foreign Participation Order*, 12 FCC Rcd 23903, para. 28 n.33.

<sup>206</sup> See Section 1377 of the Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 3106 (2000); USTR Fact Sheet on the 2001 Section 1377 Review (Apr. 2, 2001) (describing allegations with respect to Germany and progress in addressing many issues); Annual Review of Telecommunications Trade Agreements Highlights Concerns in Colombia, Mexico, South Africa, and Taiwan, USTR Press Release (Apr. 2, 2001) (USTR to continue monitoring developments in Germany to ensure compliance with international telecommunications obligations).

regardless of market forces in a manner that would harm competition in the United States.<sup>207</sup> DT's German competitors argue that DT's majority government control places DT beyond the reach of market forces, and they therefore urge the Commission to review closely the potential competitive impact of the level of government ownership and control of DT.<sup>208</sup> We recognize that a government-controlled company in a private sector market may choose for reasons other than commercial profit-maximization, i.e., political, nationalistic, or other reasons, to engage in predatory or other anti-competitive behavior as a strategic trade initiative.<sup>209</sup> We find it highly unlikely, however, that the German government, through its control of DT, would direct the Applicants to engage in unprofitable predatory practices in the United States to pursue national goals unrelated to maximizing profits.

72. First, numerous laws, including both U.S. antitrust laws and Germany's WTO trade obligations, are available to deter such predatory behavior. Second, as we explain fully below, predation in the U.S. wireless and international markets would almost surely be an unprofitable strategy, and DT's non-government shareholders would lose value should the German government attempt to pressure DT into such a predatory strategy. Therefore, DT's fiduciary responsibility to its private shareholders would likely deter DT from pursuing anti-competitive cross-subsidy schemes, because such schemes would inevitably fail and result in legal liability to its private shareholders.<sup>210</sup> Because DT is listed on the New York stock exchange, is subject to registration by the U.S. Securities and Exchange Commission, and has a fiduciary responsibility to its private stockholders, we believe there are particularly strong incentives to avoid engaging in unprofitable strategies. For these reasons, we find it highly unlikely that the German government would engage in anti-competitive behavior unrelated to earning profits.

#### **D. National Security, Law Enforcement, and Public Safety Interests**

73. In acting on applications pursuant to sections 214 and 310(b)(4), we also consider any national security, law enforcement, foreign policy, and trade policy concerns raised by the Executive Branch.<sup>211</sup> In this case, the Department of Justice and Federal Bureau of Investigation have raised such concerns, noting in particular the foreign government ownership of DT. On December 15, 2000, the Department of Justice, the Federal Bureau of Investigation, and the Applicants filed a Joint Petition to Defer

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<sup>207</sup> These concerns have traditionally been addressed as part of the economic literature regarding industrial policies. See, e.g., Robert E. Kennedy, Harvard Business School Case 9-796-184, *Economic Gains from Trade: Theories of Strategic Trade* (1996).

<sup>208</sup> QSC Comments at 13 (arguing that DT enjoys an ownership structure that immunizes it from the demands of the marketplace); GTS Comments at 11 (urging the Commission to carefully review the potential competitive impact of DT's level of government ownership and control).

<sup>209</sup> See, e.g., QSC Comments at 15-17 (contending DT's bidding for German UMTS licenses demonstrated insensitivity to capital and market factors and stating "it is dubious that the management of a firm whose obligations are not government-backed like [DT] would have shown such disregard for the judgment of the markets").

<sup>210</sup> See German Stock Corporation Act §§ 76, 93; Applicants Reply at 17.

<sup>211</sup> *Foreign Participation Order*, 12 FCC Rcd at 23918, para. 59.

Action (Petition to Defer) that expressly raised concerns that approving the DT Transfer Applications as filed would present significant impediments to the ability of the U.S. government to preserve national security, enforce the laws, and protect the public safety.<sup>212</sup> The Petition to Defer requested that the Commission defer approval of the proposed transaction until such time as an agreement could be reached between the Applicants and the Executive Branch resolving all such concerns.<sup>213</sup>

74. On January 25, 2001, the Department of Justice and the Federal Bureau of Investigation filed a Petition to Adopt Conditions to Authorization and Licenses (Petition to Adopt Conditions).<sup>214</sup> The Petition to Adopt Conditions requests that the Commission: (i) approve an Agreement, effective on the date the DT mergers with VoiceStream and Powertel close, reached between the Applicants and the Department of Justice and Federal Bureau of Investigation (DT-VoiceStream/DOJ/FBI Agreement); and (ii) condition grant of the instant application on compliance with the terms of the DT-VoiceStream/DOJ/FBI Agreement.

75. The DT-VoiceStream/DOJ/FBI Agreement provides, *inter alia*, that VoiceStream and/or DT shall: (i) ensure that its network is configured so as to be capable of complying with lawful U.S. process;<sup>215</sup> (ii) make certain call and subscriber data available in the United States, if VoiceStream stores such data;<sup>216</sup> (iii) take reasonable measures to monitor the use of facilities used in domestic telecommunications (specifically, with respect to personnel holding sensitive positions), information storage, and access to foreign entities;<sup>217</sup> and (iv) not disclose domestic communications, transactional data, classified or sensitive information to any foreign government, agent, component or subdivision thereof without the express written consent of the Department of Justice or a court of competent jurisdiction.<sup>218</sup> The Department of Justice and the Federal Bureau of Investigation gave particular attention to negotiating provisions designed to limit the control or influence of foreign governments or their representatives on DT's ability to perform these duties and obligations.<sup>219</sup> Specifically, DT expressly and irrevocably waives immunity from any legal action that may attach based on sovereignty or status as an agency or

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<sup>212</sup> VoiceStream Wireless Corporation, Powertel, Inc. and Deutsche Telekom AG., IB Docket No. 00-187, Joint Petition to Defer (filed Dec. 15, 2000).

<sup>213</sup> *Id.* at 2.

<sup>214</sup> Department of Justice and Federal Bureau of Investigation, Petition to Adopt Conditions to Authorizations and Licenses in the Matter of VoiceStream Wireless Corporation, Powertel, Inc., and Deutsche Telekom AG to permit, pursuant to Section 310(b)(4), 100 percent Indirect Foreign Ownership by Deutsche Telekom of Licenses and Authorizations Held by VoiceStream and Powertel, IB Docket No. 00-187 (dated Jan. 24, 2001) (attaching the DT-VoiceStream/DOJ/FBI Agreement).

<sup>215</sup> Petition to Adopt Conditions, Exh. 1, DT-VoiceStream/DOJ/FBI Agreement, Article 4: Disputes.

<sup>216</sup> *Id.* at Article 2: Facilities, Information Storage and Access.

<sup>217</sup> *Id.* at Article 3: Security.

<sup>218</sup> *Id.*

<sup>219</sup> Petition to Adopt Conditions at 4.

instrumentality of a foreign government.<sup>220</sup> DT also agreed to provide written notice to the Department of Justice and Federal Bureau of Investigation if any foreign government or entity controlled by a foreign government obtains an ownership interest or increases its existing ownership interest in DT.<sup>221</sup>

76. In assessing the public interest, we take into account the record and afford the appropriate level of deference to Executive Branch expertise on national security and law enforcement issues.<sup>222</sup> We recognize that, separate from our licensing process, VoiceStream and DT have entered into the DT–VoiceStream/DOJ/FBI Agreement, and that the Agreement expressly states that these agencies will not object to grant of the pending DT Transfer Applications, provided that the Commission approves the agreement and conditions grant of the DT Transfer Applications on compliance with it.<sup>223</sup> This resolution of the Executive Branch’s national security and law enforcement concerns addresses allegations that foreign government control of a U.S. carrier would pose a threat to our national security.<sup>224</sup>

77. We note that the DT–VoiceStream/DOJ/FBI Agreement contains certain provisions relevant to this transaction that, if broadly applied, would have significant consequences for the telecommunications industry. These provisions, if viewed as precedent for other service providers and potential investors, would warrant further inquiry on our part, and we will consider any subsequent agreements on a case-by-case basis. Notwithstanding these concerns about the broader implications of the DT–VoiceStream/DOJ/FBI Agreement, however, we see no reason to modify or disturb the agreement of the parties on this matter. Therefore, in accordance with the request of the Department of Justice and the Federal Bureau of Investigation, in the absence of any objection from the Applicants,<sup>225</sup> and given the discussion above, we condition our grant of the DT Transfer Applications on compliance with the DT–VoiceStream/DOJ/FBI Agreement.

## V. ALLEGED HARMS TO COMPETITION IN SPECIFIC U.S. MARKETS

78. Having concluded that DT’s partial government ownership does not contravene the public interest in promoting competition, advancing consistent trade policy, and protecting national security and law enforcement interests, we now consider allegations that DT’s entry into U.S. markets and DT’s provision of global services raise significant anti-competitive issues in specific U.S. markets. For example, some commenters contend that DT earns monopoly rents in certain service markets in Germany, where it

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<sup>220</sup> DT–VoiceStream/DOJ/FBI Agreement, at Article 4: Disputes.

<sup>221</sup> *Id.* at Article 5: Auditing, Reporting, Notice and Limits, at para. 5.2.

<sup>222</sup> *See Foreign Participation Order*, 12 FCC Rcd at 23919-21, paras. 61-66.

<sup>223</sup> DT–VoiceStream/DOJ/FBI Agreement at 18-19, Articles 7.1-7.3.

<sup>224</sup> Senator Hollings Comments at 10; Stankey Comments at 1. (arguing that permitting a foreign nation to influence the policy or operations of communications facilities could lead to sabotage and espionage).

<sup>225</sup> Petition to Adopt Conditions at 4 (noting “[t]he DOJ and FBI are authorized to state that Deutsche Telekom, VoiceStream, and Powertel do not object to the grant of this petition”).

possesses market power, and will be able to use those rents to subsidize domestic, international, and global services provided by VoiceStream in the United States.<sup>226</sup> This section analyzes these allegations by considering the competitive effect of the proposed merger in each of these markets. We note that our analysis is confined to specific harms alleged in the U.S. telephony markets, and does not consider harms that may occur in German telephony markets and any resulting impact on German consumers.<sup>227</sup> Ultimately, we conclude that the transfer of VoiceStream's and Powertel's licenses and authorizations to DT is unlikely to cause the harm alleged by the commenters and that the public interest would not be served by denying or conditioning our approval as proposed by some commenters.

#### A. Domestic Mobile Telephony Markets

79. Where a transaction involves the acquisition and aggregation of spectrum in the domestic mobile telephony markets through assignment or transfer of control of licenses, our competitive analysis focuses on an assessment of whether the combination complies with our CMRS spectrum aggregation rule.<sup>228</sup> The Applicants have certified that, while the combination creates PCS license overlaps in nine geographic markets,<sup>229</sup> grant of the applications would not violate the CMRS spectrum aggregation rule,<sup>230</sup> and we agree with the Applicants' assessment. In this case, however, commenters have alleged that this transaction involves competitive harms not addressed by the application of the spectrum aggregation limit.<sup>231</sup>

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<sup>226</sup> See, e.g., Novaxess Comments at 10; GTS Comments at 11, 15, 17, 25. See also Senator Hollings Comments at 10, 12 (arguing that DT is currently engaged in anti-competitive acts in Germany, including predatory pricing, and that, therefore the Commission should expect the same type of behavior in the United States).

<sup>227</sup> See *Foreign Participation Order*, 12 FCC Rcd at 23897-98, paras. 13-14.

<sup>228</sup> 47 C.F.R. § 20.6. As part of all applications for assignment or transfer of control of CMRS licenses, the assignee or transferee must certify that grant of the application would not cause the assignee or transferee to be in violation of the spectrum aggregation limit. See FCC Wireless Telecommunications Bureau Application for Assignments of Authorization and Transfers of Control (FCC Form 603).

<sup>229</sup> VoiceStream holds seven F block (10 MHz) BTA licenses that overlap with Powertel's 30 MHz licenses in Savannah, Georgia; Macon, Georgia; Albany, Georgia; Augusta, Georgia; Birmingham, Alabama; Huntsville, Alabama; Gadsden, Alabama; and Decatur, Alabama. See Powertel DT Application at 19. VoiceStream also holds two F block (10 MHz) BTA licenses that overlap with Powertel's two 10 MHz (D and E block) licenses in Nashville, Tennessee. *Id.*

<sup>230</sup> 47 C.F.R. § 20.6. The spectrum aggregation rule also requires us to consider the license holdings of other entities whose interests are attributable to VoiceStream, Powertel, and DT in our analysis. 47 C.F.R. § 20.6. The license holdings of these attributable interests, however, do not create overlaps in any licensed area of VoiceStream or Powertel. See VoiceStream DT Application at 4 n.5 and 29 n.87; Powertel DT Application at 4; DT Feb. 23 *Ex Parte* Letter at 2.

<sup>231</sup> See, e.g., Novaxess Comments at 10; GTS Comments at 4, 11, 15, 17, 25; WITCO Petition to Deny at 5. See also Senator Hollings Comments at 10, 12. We note that commenters have not alleged specific anti-competitive (continued....)

80. Some commenters specifically allege that DT earns monopoly rents in certain service markets in Germany, and will use these rents to subsidize VoiceStream's U.S. domestic mobile telephony services, harming U.S. consumers.<sup>232</sup> Other commenters allege that DT will use its monopoly rents to subsidize its expansion in U.S. mobile telephony markets, harming competition in the United States.<sup>233</sup> We interpret these comments as suggesting that DT will use its monopoly rents to practice price predation in the United States.<sup>234</sup> As a first step in analyzing these claims, we review the domestic mobile telephony market structure, which involves identifying the relevant product and geographic markets and other significant market participants. After establishing this predicate for our analysis, we discuss the potential for DT to earn monopoly rents and undertake a successful predatory pricing scheme. We also address DT's ability to predate were it to choose to forego profit maximization.

### 1. Relevant Markets and Significant Participants

81. *Relevant Product and Geographic Markets.* With respect to the domestic wireless markets, we conclude that the relevant product market is mobile telephony services and that the relevant geographic markets are the geographic areas in the United States where DT, VoiceStream and Powertel are readily capable of providing a facilities-based service.<sup>235</sup> According to the Applicants, VoiceStream and Powertel each hold licenses to provide PCS and supporting services.<sup>236</sup> VoiceStream controls licenses to provide PCS services to most of the country, but, according to the Applicants, still falls short of a fully nationwide licensed area, with gaps in California, Nevada, the Chicago metropolitan area, and the southeastern United

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harm with respect to the proposed alternative transaction that would involve the transfer of Powertel's licenses and authorizations to VoiceStream.

<sup>232</sup> Senator Hollings Comments at 10; GTS Comments at 15.

<sup>233</sup> Novaxess Comments at 10; WITCO Petition to Deny at 5 (arguing that DT has special privileges in its home market that it can exploit to distort competition in the United States); GTS Comments at 17, 25.

<sup>234</sup> A firm price predates in a market by first lowering its price, usually below some measure of cost, in order to drive one or more competitors out of the market, as well as deter potential market entrants. Once this is accomplished, the firm raises its price high enough above cost to recoup its losses. See Dennis W. Carlton and Jefferey M. Perloff, *Modern Industrial Organization*, at 334-335.

<sup>235</sup> Domestic mobile telephony licenses, as a general matter, are awarded by geographic area. PCS licenses are awarded based on Major Trading Areas and Basic Trading Areas. See 47 C.F.R. § 24.202. Cellular licenses are awarded based on Metropolitan Statistical Areas and Rural Service Areas. See 47 C.F.R. § 22.909. SMR licenses are awarded on either a geographic area or site-specific basis. See 47 C.F.R. Part 90, Subparts S, T. Such licenses may be combined by a particular mobile service provider to enable the provider to offer a variety of products that meet consumer demand for regional, nationwide or global access. See *In re Applications of 360° Communications Company and ALLTEL Corporation*, Memorandum Opinion and Order, 14 FCC Rcd 2005, 2012, paras. 15-16 (Wir. Tel. Bur. 1998).

<sup>236</sup> VoiceStream subsidiaries are also licensed to operate LMDS, WCS, and SMR systems. No competitive issues are raised with respect to these licenses, however, because neither Powertel nor DT hold licenses in these services nor do they provide any other services that compete with the services VoiceStream provides with these licenses.

States, among other places.<sup>237</sup> Powertel operates PCS systems in twelve states, primarily in the southeast, using GSM technology.<sup>238</sup>

82. *Significant Market Participants.* U.S. mobile telephony service providers offer local, regional, and nationwide service plans and are differentiated in their ability to compete in their product markets based on, among other things, the size and locations of their licensed areas and the extent to which they have built out their network. U.S. mobile telephony markets are characterized by as many as six mobile telephony carriers with nationwide or near nationwide licensed areas: Verizon Wireless, Cingular Wireless, AT&T Wireless, Sprint PCS, Nextel Communications, and VoiceStream. There are also a number of large regional carriers, including ALLTEL (midwest, southwest, southeast) and U.S. Cellular (primarily in the midwest with a presence on parts of the eastern and western seaboard) and medium-sized or smaller regional carriers, such as Southern LINC and Powertel (both southeast).

## 2. Competitive Analysis

83. Some commenters assert that DT earns monopoly rents (or profits) in certain service markets in Germany, where it possesses market power, and will be able to use those rents to subsidize domestic services provided by VoiceStream in the United States.<sup>239</sup> Commenters also suggest that DT could shift certain costs of operating VoiceStream in the United States to DT in Germany, so that German rate payers would pay for those costs through increased prices of non-competitive services in Germany.<sup>240</sup> Commenters further argue that, because of the monopoly rents and cost shifting, the merged entity would have the incentive and ability to engage in predatory pricing in the U.S. domestic mobile telephony market.<sup>241</sup>

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<sup>237</sup> We note that VoiceStream is continuing to diminish these gaps through other proposed acquisitions and through participation in Auction 35. See ULS File Nos. 0000287262, 0000287259, 0000288898, 0000303703, and 0000365311.

<sup>238</sup> These 12 states are Georgia, Tennessee, Alabama, Mississippi, Kentucky, Florida, Arkansas, Louisiana, Indiana, Illinois, Missouri, and South Carolina. See [www.powertel.com/htm/lea/lea\\_cov.asp](http://www.powertel.com/htm/lea/lea_cov.asp) (visited Apr. 24, 2001).

<sup>239</sup> See e.g., Novaxess Comments at 10; GTS Comments at 11, 15, 17, 25; WITCO Petition to Deny at 5. See also Senator Hollings Comments at 10, 12. Specifically, several commenters allege that DT is able to earn monopoly rents in local exchange markets through anti-competitive behavior. WITCO Petition to Deny at 6; GTS Comments at 17-24; QSC Comments at 20-24; Novaxess Comments at 11; Novaxess Reply at 3; VATM Testimony, *supra* note 175 at 6, 10-11, 19-24; VATM Propositions, *supra* note 193 at 1-7.

<sup>240</sup> See Senator Hollings Comments at 10 (alleging that DT will compete anti-competitively in the United States); Novaxess Comments at 10 (noting the potential for DT to use proceeds from monopoly pricing to subsidize its expansion into the U.S. market).

<sup>241</sup> Novaxess Comments at 10.



84. The Applicants respond that DT's ability to earn monopoly rents in Germany is constrained, *inter alia*, by regulation in Germany.<sup>242</sup> For example, the Applicants argue that price cap regulation of DT in Germany would prevent DT from shifting costs of its U.S. mobile telephony operations to its regulated services in Germany and recovering the additional costs in Germany by raising prices for its regulated services.<sup>243</sup>

85. We believe that the ability of DT to obtain monopoly rents in German markets depends on the degree to which DT dominates these markets, and the nature and the effectiveness of German regulation. The record indicates that competitors have not made significant inroads into the local exchange market.<sup>244</sup> According to a recent study conducted by the German Competitive Carrier's Association (VATM), DT retains approximately 97 percent of the local exchange market.<sup>245</sup> According to the Applicants, DT's market share in the local exchange market has declined to 95 percent as competition in these markets has increased.<sup>246</sup> Based on DT's market share, it appears possible that DT may have some capability to earn monopoly rents in the provision of local exchange services.

86. In long-distance and international markets, however, there is conflicting evidence in the record regarding DT's ability to earn monopoly rents. The Applicants assert that DT's share in these markets has fallen to 60 percent of the long-distance market and 52 percent of the market for international long-distance service.<sup>247</sup> The Applicants also state that there have been substantial price decreases for long-

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<sup>242</sup> VoiceStream DT Application at 12-13, 40-41; VoiceStream Powertel DT Reply at 12, 15-16, App. A at 3-5; Sidak Declaration at 20-23.

<sup>243</sup> Applicants Response to Feb. 9 Supplemental Information Request at 1-3.

<sup>244</sup> GTS Comments at 14; Novaxess Reply at 3 and Annex; Position Paper of Klaus Earthel at 7; QSC Comments at 4, 19-20. *See also Sixth Report on the Implementation of the Telecommunications Regulatory Package*, Commission of the European Communities (Dec. 7, 2000) (<http://europa.eu.int/ISPO/infosoc/telecompolicy/6threport.html>) (*Sixth Report*) (visited Apr. 24, 2001). With respect to Germany, this report notes, *inter alia*, concerns regarding the empowerment of the regulator (p. 13); high license fees (p. 15); new entrants' allegations that they must resort to dispute resolution in order to obtain interconnection (p. 16) and that the time-limit for interconnection delivery in Germany is not observed, despite regulatory intervention (p. 17); and the possibility that the incumbent will have a first mover advantage with respect to ADSL offerings (p. 20). On the other hand, the report indicates that Germany is doing better than other E.U. Member States in many respects, such as initiation of local loop unbundling (p. 19); grant of broadband wireless local loop licenses (p. 21); licensing of mobile service providers that use a third party's mobile network (p. 24); grant of "third generation" wireless licenses (p. 25); implementation of requirement that incumbent update its cost accounting system (p. 30); and application of LRAIC model for pricing of interconnection (p. 30).

<sup>245</sup> VATM Testimony, *supra* note 175 at 10.

<sup>246</sup> VoiceStream Powertel DT Reply, Appendix A at 11-12. As of November 1999 there were 147 carriers authorized to provide local service in Germany. *See* VoiceStream Powertel DT Reply, App. A at 11.

<sup>247</sup> *Id.* at 10.

distance and international services.<sup>248</sup> However, some commenters allege that, although there has been an increase in competition in the long distance and international markets, DT continues to dominate these markets<sup>249</sup> and that these markets are not yet “contestable.”<sup>250</sup> Commenters also provide some indication that only a few companies exert sustained competitive pressure on DT in these markets.<sup>251</sup> Though it appears that the long-distance and international markets are more competitive than the local exchange market, we do not have enough information in the record to conclude that DT is unable to dominate these markets.

87. With respect to the nature and effectiveness of German regulation, the record also presents conflicting evidence. The record indicates that Germany has enacted regulations to liberalize its telecommunications markets.<sup>252</sup> Also, DT is currently operating under a price cap regime for local exchange, long distance, and international services, although that regime expires at the end of 2001.<sup>253</sup> Several commenters, however, argue that, despite the liberalization and price cap regulation, there is a lack of regulatory oversight by the German regulator, RegTP, and DT is therefore able to behave in an anti-competitive manner.<sup>254</sup>

88. In Part IV.B above, we declined to reach a conclusion regarding the effectiveness of dominant carrier regulation or deregulation in Germany, because even if DT were able to earn monopoly rents and to shift costs from non-regulated to regulated services, the merged entity is unlikely to be able to engage in successful price predation in U.S. domestic mobile telephony services markets. The commenters here allege a standard price predation scheme that would require the merged entity to incur losses (that will increase as the predator’s market share increases relative to those of its competitors) in order to drive out competitors and obtain the ability to price above competitive levels in the future. However, an investment

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<sup>248</sup> *Id.* at 11.

<sup>249</sup> Position Paper of the Federal Ministry of Economics, *supra* note 199 at 6 (summarizing findings of the Monopoly Commission).

<sup>250</sup> *Id.* at 7. A contestable market is a market that may be competitive if there is the threat of entry by other firms into the industry even if the industry presently has few firms. See Dennis W. Carlton and Jefferey M. Perloff, *Modern Industrial Organization* at 6, 76.

<sup>251</sup> Position Paper of the Federal Ministry of Economics, *supra* note 199 at 6.

<sup>252</sup> VoiceStream Powertel DT Reply, App. A at 6-8; Position Paper of the Federal Ministry of Economics, *supra* note 199 at 2-3.

<sup>253</sup> Applicants Feb. 9 Response to Supplemental Information Request at 2; see also *Sixth Report* at 28 (noting that Germany utilizes a price cap mechanism and approves the incumbent’s end-user tariffs *ex ante*, and is considering the request of the incumbent that such regulations should be lifted). Our record does not reflect whether the price cap regulation is likely to be extended past 2001.

<sup>254</sup> QSC Comments at 21-22, 24-25; VATM Testimony, *supra* note 175 at 6-9, 12-13, 17-21, 24-30; WITCO Petition to Deny at 6; GTS Comments at 13-15, 20-22; Novaxess Reply at 4-5.

by DT in this predatory strategy is likely to prove unprofitable. As the Supreme Court explained in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*:

[T]he success of such [predatory] schemes is inherently uncertain: the short-run loss is definite, but the long-run gain depends on successfully neutralizing the competition. Moreover, it is not enough simply to achieve monopoly power, as monopoly pricing may breed quick entry by new competitors eager to share in excess profits. The success of any predatory scheme depends on *maintaining* monopoly power for long enough both to recoup the predators' losses and to harvest some additional gain. . . . For this reason, there is consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful.<sup>255</sup>

89. Based on the record, and on a careful review of the conditions in U.S. mobile telephony markets, we find that the merged entity would likely be unable to engage in successful price predation. We note that currently there are at least six other mobile wireless companies that have more subscribers and more revenues in the United States than VoiceStream.<sup>256</sup> If the merged entity were to attempt to engage in predatory pricing, it is highly unlikely that it would be able to maintain such an artificially low price for a sufficiently long period of time to drive competitors out of business. Indeed, given that VoiceStream's licensed areas are less built out than many of its competitors, it is likely that many customers would choose to stay with their current provider, even if VoiceStream priced its services lower than its competitors.<sup>257</sup>

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<sup>255</sup> *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986) (citing Robert Bork, *The Antitrust Paradox*, 149-155 (1978) (emphasis added)).

<sup>256</sup> Based on publicly available information, each of the other major wireless carriers had a significantly greater number of subscribers and substantially greater revenues than VoiceStream. At the end of 2000, Verizon Wireless had 27.5 million subscribers and revenues of \$14.2 billion. See Verizon 2000 Annual Report, *Verizon at a Glance*, at 1 (available at <http://investor.verizon.com/annual/2000/verizon2000ar06.html>) (visited Apr. 24, 2001) (Verizon 2000 Annual Report). Cingular Wireless had 19.7 million subscribers and *pro forma* revenues of \$12.6 billion. See SBC Investor Briefing, No. 223, Jan. 25, 2001 (available at [www.sbc.com/investor/Financial/Earning\\_info/docs/4Q00\\_IB.pdf](http://www.sbc.com/investor/Financial/Earning_info/docs/4Q00_IB.pdf)) (visited Apr. 24, 2001). AT&T Wireless had 15.2 million subscribers with revenues of \$10.448 billion. See *AT&T Wireless Fourth-Quarter Increases 39.1 Percent*, News Release, Jan. 29, 2001 (available at <http://www.att.com/press/item/0,1354,3628,00.html>) (visited Apr. 24, 2001). Sprint PCS had approximately 9.9 million subscribers with annual revenues of \$6.34 billion. See *Sprint Announces Record Fourth Quarter Yearly Results*, Press Release, Feb. 1, 2001 (available at [http://144.226.116.29/PR/CDA/PR\\_CDA\\_Press\\_Releases\\_Detail/1,1579,2206,00.html](http://144.226.116.29/PR/CDA/PR_CDA_Press_Releases_Detail/1,1579,2206,00.html)) (visited Apr. 24, 2001). Nextel Communications had approximately 6.7 million domestic subscribers with operating revenues of \$5.71 billion. See [www.nextel.com/about/information/corporate/profile.shtml](http://www.nextel.com/about/information/corporate/profile.shtml) (visited Apr. 24, 2001). ALLTEL had approximately 6.3 million subscribers with annual wireless revenues of \$5.5 billion. See [www.alltel.com/investors-index.html](http://www.alltel.com/investors-index.html). VoiceStream, on the other hand, had approximately 3.9 million subscribers with total revenues of \$1.9 billion. See *VoiceStream Wireless Announces 2000 Financial Results*, Press Release, Feb. 14, 2001 (available at [www.voicestream.com/about/press/press\\_20010214a.asp#](http://www.voicestream.com/about/press/press_20010214a.asp#)) (visited Apr. 24, 2001).

<sup>257</sup> VoiceStream DT Application at 23.

90. Further, even assuming that DT were successful at driving one of the six larger competitors (measured either by subscribership or revenue) out of the market, the licenses and sunk facilities of the bankrupt firm would be available for purchase by any existing or potential competitor, which, if not DT, would then resume competing against DT. While DT might seek to acquire the bankrupt firm's spectrum and facilities in order to prevent acquisition by another competitor, such a transaction would require the Commission's approval and be subject to review by U.S. antitrust authorities. For these reasons, even if DT rejected rational, profit maximizing behavior, it likely would be unable to drive any competitors out of the market, or even assuming it could do so, to keep competitors out. Therefore, we find no high competitive risk to markets or consumers in the United States such that additional reporting requirements or other safeguards would be required.

91. Moreover, the foregone profits associated with predatory pricing represent an investment that must be weighed against alternative investments.<sup>258</sup> We note that VoiceStream currently accounts for less than four percent of the U.S. domestic mobile telephony market, and currently has only built out its network to 45 percent of its licensed area.<sup>259</sup> Thus, while VoiceStream has aggressively pursued nationwide coverage, there remain significant gaps in its nationwide licensed area.<sup>260</sup> In light of this and the obligations under our rules requiring VoiceStream to meet certain build-out standards,<sup>261</sup> it is reasonable to assume that the merged entity would use its financial resources to complete its network build-out and fill in any remaining substantial gaps in its nationwide licensed area, rather than to engage in an extremely costly, and almost certainly unsuccessful, scheme of predation.

92. Therefore, it is unlikely that any attempt by the merged entity to engage in price predation in the United States would be successful. That the expected return on any investment in a predatory pricing strategy is almost surely negative suggests that the merged entity, if it were a rational, profit-maximizing firm, would have no incentive to engage in such a money-losing strategy. Finally, even if the merged entity rejected profit-maximizing behavior and attempted to predate, U.S. consumers would benefit from the lower prices during the period of predation. Moreover, because spectrum and facilities likely would not be lost to the national market in the long run, these customers would not suffer subsequent price increases as a result of particular firms being forced from the market.<sup>262</sup>

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<sup>258</sup> Cf. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. at 588 ("the foregone profits may be considered an investment in the future. For the investment to be rational, the [. . . predator] must have a reasonable expectation of recovering in the form of later monopoly profits, more than the losses suffered.").

<sup>259</sup> See VoiceStream DT Application at 23-24; VoiceStream Powertel DT Reply at 5.

<sup>260</sup> See VoiceStream DT Application at 22; Powertel DT Application at 2, 10, 19.

<sup>261</sup> 47 C.F.R. §§ 24.203, 27.14.

<sup>262</sup> See, e.g., *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) ("Without [recoupment], predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced. . . [U]nsuccessful predation is in general a boon to consumers.").

### 3. Rural Market Entry

93. Several commenters further argue that the VoiceStream DT Application should not be granted because VoiceStream has not shown sufficient commitment to build out its network in rural areas, and VoiceStream's acquisition by DT would exacerbate that situation, to the detriment of U.S. rural consumers. This issue was first raised in a petition to deny approval of VoiceStream's recent acquisition of control of approximately 144 PCS and nine WCS licenses from Cook Inlet Region, Inc. (CIRI).<sup>263</sup> We deferred consideration of the Jordan-Soldier Valley Telephone Co. (d/b/a WITCO), CIRI and VoiceStream arguments, regarding DT's acquisition of VoiceStream, to this proceeding and address them here.<sup>264</sup> WITCO argues that the pending merger of DT and VoiceStream militates against granting consent for VoiceStream to take control of licenses to serve rural markets.<sup>265</sup> WITCO argues that DT will be primarily interested in further establishing its global footprint and will not be likely to invest in rural portions of the VoiceStream territories, particularly in Iowa and Nebraska, to the detriment of rural customers.<sup>266</sup> Further, WITCO argues that the transfer of licenses from VoiceStream to DT would frustrate Congressional objectives in sections 254 and 706 of the Telecommunications Act of 1996<sup>267</sup> in that it will further widen the disparity between urban and rural consumers in the deployment of advanced telecommunications capability.<sup>268</sup>

94. UTStarcom and the Alliance for Public Technology have also raised issues about the effect of the proposed merger of DT and VoiceStream on rural markets. UTStarcom argues that, to establish its global footprint, DT will be interested in building out its GSM networks only in large, urban areas where DT can earn a greater return on its investment, and that this strategy would be evident in VoiceStream's decisions with respect to the acquisition of PCS licenses in the recent auction of PCS licenses.<sup>269</sup> UTStarcom argues further that DT could be expected to ignore the smaller towns and rural areas that will not generate large volumes of roaming, and that competition is likely to be harmed further because DT would acquire control of a larger number of entrepreneurs' block PCS licenses when it acquired VoiceStream.<sup>270</sup> UTStarcom proposes that, as a condition of granting the DT Transfer Applications, we require DT to make some amount of the entrepreneurs' block spectrum available for purchase or lease by

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<sup>263</sup> *VoiceStream/CIRI Order*, 15 FCC Rcd at 24699-700, paras. 17-19.

<sup>264</sup> *See id.* at 24701 n.67.

<sup>265</sup> WITCO Petition to Deny at 4-6.

<sup>266</sup> *Id.* at 4.

<sup>267</sup> *Id.* 3-4 (citing Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified* at 47 U.S.C. §§ 151 *et seq.*).

<sup>268</sup> *Id.*

<sup>269</sup> UTStarcom Comments at 1.

<sup>270</sup> *Id.*

eligible entrepreneurs.<sup>271</sup> The Alliance for Public Technology urges the Commission, to fulfill its responsibilities under Section 706 of the Act and to impose reporting and review conditions on the merged company's deployment in rural areas.<sup>272</sup> The Alliance for Public Technology further requests that the Commission impose similar conditions in all mergers. In response to WITCO, VoiceStream asserts that approval of the VoiceStream DT Application would further the development of VoiceStream's advanced national GSM network in both urban and rural areas.<sup>273</sup> In response to UTStarcom's request to condition the grant of the DT VoiceStream Application on VoiceStream making spectrum available to eligible entrepreneurs in rural markets, the Applicants assert that this issue is a general policy question, which should be addressed in an industry-wide rulemaking, rather than in the instant license transfer proceeding.<sup>274</sup> Further, the Applicants argue that the concerns raised by UTStarcom are currently being addressed by the Commission in other proceedings.<sup>275</sup>

95. We deny the petition of WITCO and the requests of UTStarcom and the Alliance for Public Technology and decline to hold DT to a higher standard than that embodied in our rules. The Commission's rules establish minimum service requirements for wireless carriers, and WITCO's speculation as to DT's intent has not shown that these requirements will not be met. VoiceStream's licenses are subject to construction build-out requirements found in the Commission's rules.<sup>276</sup> For PCS licenses, these rules require licensees to construct their systems so that there is sufficient signal strength to provide adequate service to one-third of the population of the market within five years and two-thirds within ten years.<sup>277</sup> For WCS licenses, licensees must construct their systems so as to provide "substantial service" at the end of the ten-year license period.<sup>278</sup> The construction build-out requirements apply to individual licenses, regardless

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<sup>271</sup> *Id.*

<sup>272</sup> Alliance for Public Technology Comments at 4.

<sup>273</sup> *Id.*; Opposition to Petition to Deny of WITCO, VoiceStream Wireless Corporation, WT Docket No. 00-207, at 7 (filed Dec. 1, 2000).

<sup>274</sup> VoiceStream Powertel DT Reply at 53.

<sup>275</sup> *Id.* at 53 (citing *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, WT Docket No. 00-230, Notice of Proposed Rulemaking, 15 FCC Rcd 24203 (2000) (*Secondary Markets NPRM*); *Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees; Implementation of Section 257 of the Communications Act*<sup>34</sup>*Elimination of Market Entry Barriers*, WT Docket No. 96-148, GN Docket No. 96-113, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21831, 21843-45, paras. 13-17 (1996)).

<sup>276</sup> See 47 C.F.R. §§ 24.203, 27.14.

<sup>277</sup> 47 C.F.R. §§ 24.203(a) and (b).

<sup>278</sup> 47 C.F.R. §§ 27.14(a); see also *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service (WCS)*, GN Docket No. 96-228, Report and Order, 12 FCC Rcd 10785, 10843-45, paras. 111-15 (1997).

of the licensee and are the standards by which all licensees' build-out performance is measured.<sup>279</sup> We therefore deny the petition of WITCO and the requests of UTStarcom and the Alliance for Public Technology for conditions.

## **B. U.S. International Services Market**

96. Commenters also argue that DT could use monopoly profits from German markets or other financial advantages to cross-subsidize U.S. international services offered by the merged entity.<sup>280</sup> Specifically, it is argued that approval will permit DT to harm U.S. competitors by offering end-to-end services to U.S. customers at rates subsidized by monopoly rents reaped in Germany.<sup>281</sup> As we explained in Part V.A above, we find that DT has neither the incentive nor the ability to engage in predatory pricing in U.S. domestic wireless markets through the use of cross-subsidies. For similar reasons, we conclude that DT would be unlikely to use successfully a predatory strategy to harm other incumbents in U.S. international services markets. Moreover, we will apply to VoiceStream and Powertel the dominant carrier safeguards described below, that will serve as an additional impediment to any cross-subsidy or other anti-competitive strategies.

### **1. Relevant Market and Significant Participants**

97. We analyze the allegations of potential anti-competitive conduct by the merged entity in the provision of international services by reference to our precedents defining the U.S. international services market. This market consists of telecommunications services from the United States to foreign countries provided to U.S. end-users.<sup>282</sup> The geographic markets consist of each of the routes between the United States and other countries.<sup>283</sup> We also examine the allegations of potential anti-competitive conduct by determining the significant competitors in the U.S. international services market. These include the major

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<sup>279</sup> In addition, the Commission is currently exploring how to enhance the effectiveness of acquisition of spectrum in the secondary markets to ensure, among other things, that spectrum-based services are fully deployed in rural markets. See *Secondary Markets NPRM*, at paras. 7-8.

<sup>280</sup> See GTS Comments at 2-3; Novaxess Comments at 10; QSC Comments at 12-13.

<sup>281</sup> Senator Hollings Comments at 10.

<sup>282</sup> End-user services refer to the complete telecommunications service offered to business or residential customers, such as international services on the U.S.-Germany route. *MCI Communications Corporation, British Telecommunications plc*, Declaratory Ruling and Order, 9 FCC Rcd 3960, 3970-71, para. 50 (1994).

<sup>283</sup> "U.S. international services" comprise all U.S.-billed telecommunications services, including calls that originate in the United States and terminate at a foreign point and calls that originate at a foreign point but are billed by a U.S. carrier, such as international calling card calls. See *WorldCom/MCI Order*, 13 FCC Rcd at 18070-71, para. 78 n.240.

facilities-based providers of long-distance service in the United States, including AT&T, WorldCom, and Sprint, as well as other large carriers serving individual routes.<sup>284</sup>

## 2. Competitive Analysis

98. VoiceStream, Powertel, and DTI are each participants in the U.S. international services market, although they are not significant participants. VoiceStream and Powertel are exclusively providers of pure resale services and have only *de minimis* market shares of the end-user market.<sup>285</sup> DT currently provides service in the United States only through its affiliate DTI, which is a facilities-resale carrier and has only a *de minimis* share of the end-user market.<sup>286</sup> In addition, the merger will not significantly increase concentration on any U.S. international route because of the *de minimis* market shares of DTI, VoiceStream, and Powertel.<sup>287</sup> Therefore, the merger will not eliminate a significant competitor or raise significantly market concentration on any route.

99. We find that, for the same reasons discussed in Part V.A. above, the merger will not provide DT with the incentive or the ability to engage in a predatory pricing strategy through cross-subsidy and harm the U.S. international services market. VoiceStream, Powertel, and DTI are not significant participants in the U.S. end-user international services market. Thus, based on the existence of significantly stronger competitors in international services, we conclude that the merged entity would not be able to maintain an artificially low price for a sufficiently long period to drive competitors out of business.

## 3. Dominant Carrier Safeguards

100. In the *Foreign Participation Order*, we established rules to identify instances of potential competitive harm by U.S. market entry of a foreign carrier and to guard against them. Under these rules, we classify a U.S. carrier as dominant on a particular route if it is affiliated with a foreign carrier that controls essential facilities on that route.<sup>288</sup> A carrier classified as dominant is subject to dominant carrier

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<sup>284</sup> The carriers with the highest billed revenues for all U.S. facilities-based and facilities-resale services in 1999 were AT&T (\$7.34 billion), WorldCom Inc. (\$5.45 billion) and Sprint (\$1.51 billion). The total billed revenues for all U.S. facilities-based and facilities-resale services for all U.S. carriers combined were \$15.8 billion. FCC, Common Carrier Bureau, Industry Analysis Division, *1999 International Telecommunications Data* (Dec. 2000), at 27, Fig. 7 & at 2, Fig. 1.

<sup>285</sup> In 1999, VoiceStream reported revenue of \$58,787 from International Message Telephone Resale Service in its own company name, plus \$5,557,384 for Omnipoint Corporation and \$8,171 for Aerial Communications, Inc. but no revenues from U.S. facilities-based and facilities-resale services, and Powertel did not report any international billed revenue in 1999. FCC, Common Carrier Bureau, Industry Analysis Division, *1999 International Telecommunications Data* (Dec. 2000), at 27, Fig. 7, at 2, Fig. 1, and Resale Services Pages 1-9, Table D.

<sup>286</sup> DTI did not report any international billed revenue in 1999. FCC, Common Carrier Bureau, Industry Analysis Division, *1999 International Telecommunications Data* (Dec. 2000), at 27, Fig. 7, at 2, Fig. 1, and Resale Services Pages 1-9, Table D.

<sup>287</sup> See *supra* Part V.B.1 discussing relevant markets and significant participants.

<sup>288</sup> See *Foreign Participation Order*, 12 FCC Rcd at 23991, para. 221.



safeguards.<sup>289</sup> These safeguards include various accounting, structural separation, and reporting requirements that are designed to address the possibility that a foreign carrier with control over facilities or services that are essential inputs for the provision of U.S. international services could discriminate against rivals of its U.S. affiliates (i.e., vertical harms). In the *Foreign Participation Order*, we concluded that these safeguards, along with our benchmark and no special concession rules, are sufficient to protect against vertical harms by carriers from WTO countries in virtually all circumstances.<sup>290</sup> In the exceptional case where an application poses a very high risk to competition in the U.S. market, and where our standard safeguards and additional conditions would be ineffective, we reserve the right to deny the application.<sup>291</sup>

101. We apply the requirements of the *Foreign Participation Order* to the merger application as follows. DT controls long-distance and local termination facilities within Germany, Slovakia, Hungary, and Croatia.<sup>292</sup> We currently regulate DT as dominant on the U.S.-Germany route, the U.S.-Slovakia route, the U.S.-Hungary route, and the U.S.-Croatia route as reflected in DTI's recent section 214 authorizations and foreign carrier notifications.<sup>293</sup>

102. Therefore, VoiceStream and Powertel, as affiliates of DT, are subject to dominant carrier safeguards under section 63.10 of our rules.<sup>294</sup> Under sections 63.09 and 63.10 of our rules, VoiceStream and Powertel, as entities controlled by DT, will also be classified as dominant international carriers on the

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<sup>289</sup> See 47 C.F.R. § 63.10.

<sup>290</sup> See 47 C.F.R. § 63.10; 47 C.F.R. § 63.14; see *Foreign Participation Order*, 12 FCC Rcd at 23913-14, paras. 51-52.

<sup>291</sup> *Foreign Participation Order*, 12 FCC Rcd at 23913-14, paras. 51-52.

<sup>292</sup> Upon consummation of the transaction, VoiceStream will become affiliated, within the meaning of section 63.09 of our rules, with DT's foreign carrier affiliates. These affiliated carriers include the following four carriers that are incumbents in their countries' long distance or local termination markets: Hrvatske Telekomunikacije d.d., (Croatia); Deutsche Telekom AG and operating subsidiaries (Germany); MATAV Magyar Tavkozlesi Rt., (Hungary); Slovak Telecom (Slovakia). See *List of Foreign Telecommunications Carriers that are Presumed to Possess Market Power in Foreign Telecommunications Markets*, DA 99-809, (rel. June 18, 1999); see also Application to Transfer Control of International Section 214 Authorizations and Notification of Affiliations with Foreign Carriers, App. B. We note that VoiceStream will also become affiliated with DT's affiliate in Uzbekistan—Chirkom. The Applicants state however that upon closing the merger, VoiceStream and its subsidiaries will surrender their authorizations to provide service on the U.S.–Uzbekistan route. *Id.* at 7.

<sup>293</sup> See VoiceStream DT Application at 9 n.19, 31; Amendment to Applications to Transfer Control of International Section 214 authorizations and Notification of Affiliations with Foreign Carriers (filed Feb. 16, 2001) at 3. See also *List of Foreign Telecommunications Carriers that are Presumed to Possess Market Power in Foreign Telecommunications Markets*, DA 99-809 (rel. June 18, 1999).

<sup>294</sup> We note that VoiceStream and Powertel are authorized to resell services of other carriers, including the services of DTI, which will become VoiceStream's and Powertel's affiliate upon consummation of the merger, and is a facilities-based carrier. See VoiceStream DT Application at 31; Powertel DT Application at 21-22. Therefore, VoiceStream and Powertel do not qualify for the exemption from dominant carrier safeguards under section 63.10(a)(4) of the rules.

U.S.–Germany, U.S.–Slovakia, U.S.–Hungary, and U.S.–Croatia routes. Accordingly, on each of these routes, VoiceStream and Powertel will be required, for the provision of international services, to maintain separate books of account from DT and the affiliated foreign carriers in these markets; not jointly own transmission or switching facilities with DT and these carriers; file quarterly reports of revenue and traffic; file quarterly reports summarizing the provisioning and maintenance of all basic network facilities and services procured from DT and these carriers; and file quarterly circuit status reports.<sup>295</sup> These requirements are designed to make a carrier's interaction with its affiliated foreign carrier transparent and thereby guard against discriminatory conduct.<sup>296</sup> We believe that the imposition of dominant carrier safeguards along with our benchmark and no special concession rules are sufficient to prevent vertical harms by the merging parties. In addition, some of the dominant carrier safeguards—such as the requirement to maintain separate books and the prohibition on joint ownership of facilities—provide additional confidence that DT will not have the ability to engage in cross-subsidization with respect to international services provided by its U.S. affiliates. We therefore find that merger will not create risks to competition in the U.S. international services market that would warrant the imposition of additional competitive safeguards.<sup>297</sup>

### C. Global Wireless Issues

103. Several commenters ask that we carefully evaluate whether the merger of DT and VoiceStream will allow DT to act anti-competitively in the provision of wireless services in the global market, thereby harming U.S. competitors in the provision of global wireless services. These commenters urge us to impose additional safeguards to promote competition in this market.<sup>298</sup> Specifically, they argue that, because DT and VoiceStream employ the same GSM technology, the merged company will have an unfair advantage in the global market.<sup>299</sup> They further contend that given DT's significant investment in

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<sup>295</sup> See 47 C.F.R. § 63.10(c).

<sup>296</sup> See *Foreign Participation Order*, 12 FCC Rcd at 23991-24022, paras. 221-292.

<sup>297</sup> See *id.* at 23913, para. 51.

<sup>298</sup> GTS points to the increasing use of multi-national roaming agreements and the increasing capabilities of mobile technologies as evidence of the rapid globalization of the mobile market. GTS Comments at 2-3, 7 (noting that the Commission should assess the rapidly-developing global wireless market to determine what additional safeguards might be necessary to promote competition and protect the public interest); Senator Hollings Comments at 12 (urging the Commission to look globally at competition in the wireless sector); QSC Comments at 12, 17-19 (arguing that the ongoing globalization of wireless markets creates unique avenues for exercising market power); Novaxess Comments at 9-10 (asserting that given the globalization of wireless markets, the U.S. domestic wireless market is not the only relevant market, noting efforts by the European Commission to promote a transnational market approach, and arguing that DT will exploit its unfair market advantage in offering global wireless services).

<sup>299</sup> Senator Hollings Comments at 12; QSC Comments at 17-19; GTS Comments at 2-3. DT also employs GSM in its non-European mobile telephone subsidiaries. Mobile telephony carriers in the United States, however, are not constrained in the choice of technology, and currently VoiceStream is the only major U.S. mobile telephony carrier that uses the GSM standard as the primary technology in its network. Powertel, a regional carrier, also employs GSM, and this analysis applies equally to Powertel.

universal mobile telecommunications system (UMTS) licenses and its expanding global footprint into the United States, DT is positioning itself for global dominance.<sup>300</sup>

104. We decline to define a global wireless services market at this time because we do not have evidence that such a market yet exists. While there is some evidence that markets for U.S. international roaming services as well as international roaming services in foreign countries are developing,<sup>301</sup> we are not yet aware that customers are demanding a complete seamless wireless service. Nevertheless, because the global evolution of the wireless industry is likely to have an important effect on U.S. end-users, we will examine whether the proposed merger could have an anti-competitive impact on this evolution and harm competition for these services in the United States. Specifically, we address allegations regarding (i) the availability of international roaming services to U.S. end-users; (ii) the reliance on global standards for the development of “third generation” wireless technology;<sup>302</sup> and (iii) the development of multinational footprints by DT and other wireless carriers.

### 1. Background

105. With the explosive growth of the wireless industry throughout the world, we recognize that carriers are offering wireless service in an increasingly global context. For example, U.S. mobile telephony service providers have begun to offer international roaming services and are seeking the ability to allow customers to use their mobile telephones outside the United States.<sup>303</sup> New technology is bringing the World Wide Web to wireless phones. When evaluating potential competitive harms, however, our concern is not solely whether a particular service provider will possess competitive advantages in the provision of

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<sup>300</sup> GTS Comments at 2-3; Senator Hollings Comments at 12 (arguing that DT is positioning itself as the dominant provider of wireless services in the global market, given its significant investment in UMTS licenses in Europe and the ability of the merged entity to provide international roaming on a GSM-based network).

<sup>301</sup> We acknowledge, for example, that communications firms, driven by competitive pressures, will seek to extend access to the services they provide beyond the reach of their own facilities.

<sup>302</sup> Current wireless technology is considered “second generation.” Second generation wireless systems are digital systems such as digital cellular and PCS. See *In the Matter of Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, ET Docket No. 00-258, Notice of Proposed Rulemaking, FCC 00-455 (rel. Jan. 4, 2001) at para. 3 n.8. Over the next few years, carriers plan to launch “third generation” wireless services that will support wireless Internet service at data speeds significantly above the current average of about 10 kilobits per second. See generally, e.g., Newsbytes, “Ericsson Unveils 3G Technology in India” (March 26, 2001) ([http://www.3gnewsroom.com/3g\\_news/news\\_0466.shtml](http://www.3gnewsroom.com/3g_news/news_0466.shtml)) (visited Apr. 24, 2001); Adam Creed, *ComputerUser.com*, “Australia 3G Telecom Auction raises \$577 Million” (March 22, 2001) (<http://www.computeruser.com/news/01/03/26/news12.html>) (visited Apr. 24, 2001); International Telecommunication Union, 3rd Generation Mobile Services And Applications (March 26, 2001) ([http://www.itu.int/imt/what\\_is/3rdgen/](http://www.itu.int/imt/what_is/3rdgen/)) (visited Apr. 24, 2001).

<sup>303</sup> Roaming services are offered by mobile telephony providers seeking to extend their customers’ access to services beyond the direct reach of their own facilities. International roaming occurs when mobile service is provided in a country in which the carrier does not have its own facilities.

global wireless services, as commenters contend DT will. Instead, we ultimately assess whether the competitive advantage confers the ability to exclude rivals from the market, thereby impeding competition and causing harm to end-users. A mere finding that a firm has certain advantages over its competitors, therefore, is not a basis for concluding that the firm has engaged in or will engage in anti-competitive behavior because the development of unique competitive advantages is the essence of the competitive process.

106. Based on our analysis of technological and economic factors, we find that any advantage that the merged entity may enjoy (because both VoiceStream and DT currently use GSM technology, or because DT has a wireless presence in many countries and has recently acquired “third generation” UMTS wireless licenses) is unlikely to produce anti-competitive effects in the provision of global services.

## **2. Competitive Analysis**

### **a. International roaming**

107. We conclude that the merger of DT and VoiceStream is unlikely to permit them to act anti-competitively in providing international roaming services. First, we note that, regardless of the technology a mobile telephony provider chooses, roaming can only be accomplished with the use of compatible equipment. Thus, for any carrier to offer international roaming services in a country where carriers use only a GSM air interface, its customers must have compatible GSM equipment.<sup>304</sup> We also note that U.S. GSM equipment is not compatible with overseas GSM networks without further modification because different spectrum bands are employed.

108. While both DT and VoiceStream employ GSM, the current European allocation of spectrum for mobile telephony services differs from that in the United States. European providers of mobile telephony services generally operate either in the 900 MHz or 1700 and 1800 MHz bands, while U.S. mobile telephony service providers using PCS operate between 1850 and 2200 MHz,<sup>305</sup> those using cellular licenses operate in the 800 MHz band,<sup>306</sup> and those using SMR licenses operate at 220, 800 and 900 MHz.<sup>307</sup> Because different frequencies are used in Europe and the United States, no U.S. mobile telephony carrier currently can provide international roaming services on a single-band mobile telephone tuned for U.S. allocations for mobile telephony. Therefore, as a practical matter, all U.S. mobile telephony carriers, including VoiceStream, must provide different or upgraded equipment to offer these services via a single handset. In order to offer international roaming services, GSM U.S. mobile telephony carriers must provide “dual-band” equipment; non-GSM U.S. mobile telephony carriers must provide “dual-mode” equipment that is capable of operating with a GSM network (or any other technology employed in a network).

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<sup>304</sup> Similarly, in U.S. domestic mobile telephony markets, a customer of a CDMA carrier cannot obtain digital roaming service from a TDMA or GSM carrier without having a handset compatible with TDMA or GSM.

<sup>305</sup> See 47 C.F.R. § 24.5 (defining “Broadband PCS” spectrum).

<sup>306</sup> See 47 C.F.R. § 22.905.

<sup>307</sup> See 47 C.F.R. §§ 90.613, 90.715.

109. We also note that a number of U.S. mobile telephony service providers, including VoiceStream, currently provide international roaming services to Europe (and other countries where GSM is employed) through roaming agreements and offer the purchase or rental of special equipment for this purpose.<sup>308</sup> While the international roaming rates charged by all U.S. providers are comparable, VoiceStream charges less to consumers for the equipment needed for international roaming than other U.S. mobile telephony service providers.<sup>309</sup> Assuming that this price differential is related to VoiceStream's choice of the GSM standard, which eliminates the need for a dual-mode phone, it may be possible that VoiceStream's choice of GSM already provides it with some competitive advantage in international roaming. Both the Applicants and some commenters believe that VoiceStream's GSM network is a key asset for the provision of advanced global services, such as worldwide voicemail access and single source billing.<sup>310</sup> However, we do not find anything anti-competitive about this. Anti-competitive effects may occur when rivals are excluded from use of compatible standards. However, the various second and third generation wireless standards are open standards and are available for all carriers to use.

110. We further note that commenters do not clearly identify how the merger of DT and VoiceStream—as distinguished from their use of a common GSM air interface absent the merger—will reduce competition in the provision of international roaming services, nor do they suggest a specific condition that would address the issues. Even assuming the merger somehow may lower VoiceStream's cost of providing international roaming in those countries where DT holds a license and provides additional global services, producing additional competitive advantage for VoiceStream, we find no basis in the record to conclude that the merger of DT and VoiceStream would cause other U.S. mobile telephony service providers to be excluded from providing these services, or otherwise permit the merged entity to act anti-competitively.<sup>311</sup>

111. Finally, DT's ownership of VoiceStream does not leave other U.S. mobile telephony service providers without options for roaming partners in Germany and other countries where DT's T-Mobile has a subsidiary. Any foreign provider of mobile telephony services is a potential roaming partner for U.S. providers, regardless of network technology, and there appear to be a sufficient number of potential partners to support an open market for international roaming agreements. In this regard, we note that DT's U.K. wireless subsidiary, One2One, has international roaming agreements in Germany with three of DT's

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<sup>308</sup> See, e.g., [www.attws.com/personal/explore/intl\\_calling/world\\_connect](http://www.attws.com/personal/explore/intl_calling/world_connect) (visited Apr. 24, 2001); [www.nextel.com/phone\\_services/worldwide/coverage/country\\_list.shtml](http://www.nextel.com/phone_services/worldwide/coverage/country_list.shtml) (visited Apr. 24, 2001); [www.voicestream.com/products/coverage/global.asp](http://www.voicestream.com/products/coverage/global.asp) (visited Apr. 24, 2001).

<sup>309</sup> Compare [www.voicestream.com](http://www.voicestream.com) (advertising international mobile telephones at \$99.99 and \$199.99) (visited Apr. 24, 2001) with [www.nextel.com](http://www.nextel.com) (advertising an international mobile telephone for purchase at a special rate of \$199.00 or for rent at \$9.95 per day) (visited Apr. 24, 2001).

<sup>310</sup> See, e.g., DT VoiceStream Application at 27; Siemens Comments at 1.

<sup>311</sup> Further, we note that, of VoiceStream's annual 2000 revenue of \$1,923 million, only \$4 million, or 0.2 percent, is from roaming by German wireless customers. Of DT's German wireless operations year-2000 revenue of 6,483 million euros, only 0.7 million euros, or 0.01 percent is from roaming in Germany by VoiceStream customers. Applicants Mar. 2 Response to Supplemental Information Request at 2.

rivals.<sup>312</sup> We therefore have no specific reason to expect that the merger of DT and VoiceStream will result in the inability of other U.S. mobile telephony service providers to offer international roaming services in Germany. In summary, we find insufficient basis to conclude that the merger would lead to anti-competitive behavior by the merged entity in the provision of international roaming services to U.S. consumers.

**b. Third generation technology**

112. We also are not persuaded by commenters' claim that DT's acquisition of "third generation" UMTS wireless licenses will have an anti-competitive, exclusionary effect, either globally or in the United States.<sup>313</sup> DT's mobile subsidiary, T-Mobile, recently won two UMTS licenses in Germany and plans to offer third generation services by 2003.<sup>314</sup> However, other companies, e.g., E-Plus, Group 3G, MobilCom, and Viag Intercom, have also won UMTS licenses in Germany.<sup>315</sup> Moreover, it is unlikely that VoiceStream will be the sole U.S. carrier to adopt WCDMA, the technical standard European wireless carriers will use to provide UMTS services.<sup>316</sup> Both AT&T Wireless and Cingular Wireless plan to rely on WCDMA,<sup>317</sup> greatly reducing any VoiceStream competitive advantage based on its choice of technology. Further, even if VoiceStream has a competitive advantage as the only U.S. mobile telephony service provider to employ a technology similar to carriers in other countries, this fact alone would not suggest that it was engaging, or could engage, in anti-competitive behavior because U.S. carriers are free to choose among competing technical standards for the provision of third generation wireless services.<sup>318</sup>

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<sup>312</sup> See [www.one2one.com/framework/frameIE.htm](http://www.one2one.com/framework/frameIE.htm) (visited Apr. 24, 2001).

<sup>313</sup> QSC Comments at 15-17; VATM Testimony, *supra* note 175 at 13-15; Senator Hollings Comments at 12; Novaxess Comments at 10. UMTS uses the wideband code division multiple access (WCDMA) standard and, in Europe, operates in the 2 GHz band. See *European Radiocommunications Committee Decision of 30 June 1997*, on the frequency bands for the introduction of the Universal Mobile Telecommunications Systems (UMTS), ERC/DEC/(97)07, European Conference of Postal and Telecommunications Administration.

<sup>314</sup> See [http://www.t-mobile.com/technews\\_q3\\_180800.html](http://www.t-mobile.com/technews_q3_180800.html) (visited Apr. 24, 2001).

<sup>315</sup> QSC Comments at 15-16. E-Plus is held partly by KPN Mobile and NTT; Group 3G is held by Sonera (Finland) and Telefónica of Spain; MobilCom is held partly by France Telecom; and Viag Intercom is held partly by British Telecom. DT VoiceStream Application at 13-14.

<sup>316</sup> Betsy Harter, "Putting the C in TDMA?," *Wireless Review* (Jan. 1, 2001).

<sup>317</sup> *Id.*; see also *AT&T and NTT DoCoMo Announce Strategic Wireless Alliance*, News Release, Nov., 30, 2000 (available at [www.att.com/press/item/0,1354,3502,00.html](http://www.att.com/press/item/0,1354,3502,00.html)) (visited Apr. 24, 2001).

<sup>318</sup> See generally *In the Matter of Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems*, ET Docket No. 00-258, Notice of Proposed Rulemaking, FCC 00-455 (rel. Jan. 4, 2001).

**c. Expansion of global footprint**

113. Several commenters further argue that by expanding its global footprint into the United States, DT is positioning itself for global dominance. Upon consummation of the merger, DT will own wireless carriers in Germany, the United Kingdom, Austria, Hungary, and the United States, as well as hold interests in wireless carriers in other countries.<sup>319</sup> DT's most important subscriber bases will be Germany (13 million subscribers), the United Kingdom (6 million subscribers) and the United States (3.9 million subscribers).<sup>320</sup> DT is not alone, however, in seeking an international footprint. Nor is it the first or the largest carrier to do so. Verizon Wireless, which is 45 percent owned by Vodafone Airtouch Plc, is already part of the Vodafone Group Worldwide,<sup>321</sup> which serves more subscribers in these key countries—Germany, the United Kingdom, and the United States—than DT.<sup>322</sup> In addition, AT&T Wireless and NTT DoCoMo, the largest wireless carrier in Japan, have formed an alliance.<sup>323</sup> That other large carriers are expanding their worldwide coverage suggests that this is a sensible competitive strategy rather than an independent attempt by DT unfairly to dominate global services. We would expect other U.S. carriers also to try to take advantage of the likely pro-competitive benefits of global expansion, such as economies of scale, seamless service through standardization, reduction of risk through geographic diversification, and speed in disseminating innovations. Because the global expansion of other U.S. mobile telephony service providers is underway, the merger of DT and VoiceStream is not likely to preclude other U.S. carriers from pursuing a global strategy. Moreover, as a signatory to the WTO accords, the United States has endorsed global competition in wireless services.<sup>324</sup> Permitting DT's effort to gain a competitive advantage by expanding into the U.S. mobile telephony service market is consistent with the U.S. WTO obligations.

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<sup>319</sup> See [www.telekom.de/dtag](http://www.telekom.de/dtag).

<sup>320</sup> See [www.telekom.de/dtag](http://www.telekom.de/dtag).

<sup>321</sup> See [www.vodafone.com](http://www.vodafone.com).

<sup>322</sup> Verizon Wireless, a joint venture of Verizon Communications, Inc. and Vodafone AirTouch Plc, is the largest wireless company in the United States by number of subscribers, with 27.5 million subscribers at year-end 2000. See Verizon 2000 Annual Report, *supra* note 256. Vodafone Group Plc, the largest wireless company in the United Kingdom, with 10.2 million subscribers, is the parent company of Vodafone AirTouch. It is also the parent company of Mannesmann AG, the largest wireless company in Germany, with 16.4 million subscribers. See [www.vodafone.com](http://www.vodafone.com) (data provided as of Sept. 30, 2000) (visited Apr. 24, 2001).

<sup>323</sup> NTT DoCoMo recently invested \$9.8 billion in AT&T Wireless and plans jointly to develop the U.S. mobile multimedia market, promote the proliferation of WCDMA third generation wireless technology in the U.S. market, and develop international roaming operations. See *NTT DoCoMo to Buy Stake in AT&T Wireless*, News Release, Nov. 30, 2000 (available at <http://www.nttdocomo.com/new/contents/00/whatnew1130b.html>) (visited Apr. 24, 2001).

<sup>324</sup> See U.S. commitments regarding mobile services in the WTO Basic Telecommunications Agreement, Schedule of Specific Commitments of the United States of America, incorporated into the General Agreement on Trade in Services by the Fourth Protocol to that agreement (WTO 1997), 36 I.L.M. 366 (1997).

114. Therefore, because we conclude that the transfer will result in no anti-competitive effects in the provision of global services in the United States, we find that this is not a basis for denying, or further conditioning, approval of the proposed transfers.

#### **D. Conclusion**

115. In summary, as discussed in Parts IV and V, the harms that could flow from the proposed VoiceStream Powertel DT merger, or the alternative VoiceStream Powertel merger, are remote. DT's partial government ownership does not appear to increase the likelihood of anti-competitive activity or present unique competitive harms. Contrary to commenters' assertions, we find no basis to conclude that DT has the incentive or ability to anti-competitively cross-subsidize its operations in any relevant market. We also note that the Applicants' agreement with the Department of Justice and Federal Bureau of Investigation substantially reduces the potential for harm to U.S. national security, law enforcement, and public safety interests.

### **VI. ALLEGED PRO-COMPETITIVE BENEFITS**

116. *DT-VoiceStream-Powertel Merger.* The Applicants contend that the proposed DT-VoiceStream-Powertel merger will generate significant public interest benefits and efficiencies.<sup>325</sup> They argue that consumers will benefit from the significant expansion of the nationwide footprint for GSM subscribers, which will result in additional competition in the mobile voice market nationwide, which is currently served, in addition to VoiceStream, by Verizon Wireless, Cingular Wireless, Sprint PCS, AT&T Wireless, and Nextel Communications.<sup>326</sup> Further, they claim that the proposed merger will produce benefits through economies of scale and scope, improved spectrum efficiency, and wider availability of advanced services.<sup>327</sup>

117. The Applicants further contend that the proposed merger will provide VoiceStream with the resources necessary to accelerate the build-out of VoiceStream's existing licenses and to acquire additional spectrum to fill out its near nationwide footprint.<sup>328</sup> The build-out and extension of

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<sup>325</sup> VoiceStream DT Application at 24-29; Powertel DT Application at 16-19; *see also* Letter from the Honorable Patty Murray, U.S. Senator, and the Honorable Maria Cantwell, U.S. Senator to Michael K. Powell, Chairman of the Federal Communications Commission, IB Docket No. 00-187 (filed March 15, 2001) (stating that the proposed merger will benefit consumers and in no way reduce competition and noting that denying approval would violate U.S. commitments under the WTO Basic Telecommunications Agreement, which could start a trade war damaging exports in every sector of the U.S. economy); Letter from the Honorable George R. Nethercutt, Jr., the Honorable Jennifer Dunn, the Honorable Norm Dicks, the Honorable Doc Hastings, the Honorable Adam Smith, the Honorable Jay Inslee, the Honorable Jim McDermott, the Honorable Rick Larson, and the Honorable Brian Baird, U.S. House of Representatives to Michael Powell, Chairman of the Federal Communications Commission, IB Docket No. 00-187 (filed Feb. 16, 2001) (citing the public interest benefits of the proposed merger, noting that denying approval would violate U.S. commitments under the WTO Basic Telecommunications Agreement).

<sup>326</sup> VoiceStream DT Application at 25-26; Powertel DT Application at 17.

<sup>327</sup> VoiceStream DT Application at 27-29; Powertel DT Application at 17-18.

<sup>328</sup> VoiceStream DT Application at 24-25.



VoiceStream's network will enable the merged company to deploy additional wireless services, including services that DT provides in Europe but are not yet available in the United States.<sup>329</sup> As VoiceStream's network is built out and new spectrum added, roaming charges incurred by VoiceStream's subscribers will be reduced.<sup>330</sup>

118. The Applicants also argue that the merger will present opportunities for a single-handset global service on DT's GSM network<sup>331</sup> with such features as worldwide voicemail access numbers and transferable prepaid calling plans.<sup>332</sup> In addition, the Applicants claim that the merger will produce benefits through economies of scale and scope by allowing VoiceStream to procure handsets and infrastructure equipment at attractive prices and drive down other costs, and these cost savings may be passed on to customers.<sup>333</sup> The Applicants argue that the merger with DT will provide VoiceStream with the needed financing in order to deploy next-generation wireless services, which will provide U.S. consumers with another choice in obtaining high-speed data services.<sup>334</sup>

119. According to the Applicants, DT's acquisition of Powertel will provide consumer benefits similar to those provided by its acquisition of VoiceStream, and some of these benefits will be greater for Powertel users than for VoiceStream users.<sup>335</sup> DT's acquisition of Powertel will provide the capital necessary to build out and upgrade Powertel's network and allow the deployment of advanced services over this network, that otherwise would not take place given the fact that Powertel is a regional and not a national operator.<sup>336</sup> Since Powertel is a regional provider, folding Powertel's network into VoiceStream's will decrease roaming charges to Powertel's customers and give them access to a provider with a near nationwide footprint.<sup>337</sup> Also, the acquisition of Powertel will fill in one of VoiceStream's remaining substantial gaps in its national footprint in the southeastern United States.<sup>338</sup>

120. Commenters in this proceeding discuss many of the same public benefits claimed by the Applicants. The Organization for International Investment, Communication Workers of America, Siemens

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<sup>329</sup> *Id.* at 27.

<sup>330</sup> *Id.* at 26.

<sup>331</sup> *Id.* at 27; Powertel DT Application at 18.

<sup>332</sup> VoiceStream DT Application at 27.

<sup>333</sup> *Id.*

<sup>334</sup> *Id.* at 28-29.

<sup>335</sup> Powertel DT Application at 16-19.

<sup>336</sup> *Id.* at 17.

<sup>337</sup> *Id.* at 17.

<sup>338</sup> *Id.* at 10.

and Stan Kugell each argue that the merger will provide VoiceStream with an infusion of capital that will permit it to build out its network and extend its national footprint.<sup>339</sup> These commenters each claim that the merger will enable VoiceStream to deploy new services including next generation wireless services.<sup>340</sup> Siemens and Stan Kugell point out the benefits of the merged entity being able to offer a global wireless network to VoiceStream's customers.<sup>341</sup> The Communications Workers of America argue that U.S. consumers and workers will benefit from a transfer of positive elements of DT's corporate culture, such as a strong labor/management partnership and corporate involvement in connecting schools to the Internet.<sup>342</sup> The National Consumers League similarly claims that consumers can be expected to benefit in view of DT's record as a good employer and corporate citizen.<sup>343</sup>

121. We agree with the Applicants that the build-out and extension of VoiceStream's network to expand VoiceStream's reach significantly, both nationwide and internationally, constitutes a clear, transaction-specific public interest benefit. A significant percentage of mobile phone users desire nationwide access, and those users will benefit from the continued expansion of the VoiceStream network and the resulting increase in competition in mobile services. We are persuaded that new services, new features, and potentially reduced roaming charges to consumers will result from the merger. We also believe that the combined DT/VoiceStream/Powertel company will become a stronger competitor among other large companies providing international roaming services and that U.S. consumers will gain benefits from increased choices and competition in such international roaming services.

122. We agree with the Applicants that GSM subscribers will benefit from the expanded licensed area to be created by combining VoiceStream and Powertel under ownership of DT, and that all mobile phone users needing nationwide access will benefit significantly from the expansion of VoiceStream's licensed area. Moreover, this expansion of VoiceStream's licensed area will provide more consumers in the southeast United States with an additional, and possibly less expensive, opportunity to subscribe to a carrier that enables both local and international access.

123. *VoiceStream-Powertel Merger.* The Applicants contend that the proposed VoiceStream-Powertel merger, which will occur only if the proposed merger between DT and VoiceStream is not

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<sup>339</sup> OII Comments at 3; CWA Comments at 3; Siemens Comments at 1; Kugell Comments at 1.

<sup>340</sup> OII Comments at 3; CWA Comments at 2-3; Siemens Comments at 1; APT Comments at 3.

<sup>341</sup> Siemens Comments at 1; Kugell Comments at 1; *but see* QSC Comments at 18-19. QS Communications AG disputes the claim that providing VoiceStream's subscribers enhanced global roaming services will be a public benefit. QSC contends that, if VoiceStream subscribers enjoy preferential rates for roaming on DT's networks, such rates may have been achieved through discrimination in roaming abroad against other U.S. carriers that are migrating to GSM compatible standards; such discrimination would render illusory any supposed benefit to competition. *Id.* As discussed in detail above, however, we find it unlikely that DT will be able to discriminate in this way given the competition and regulatory safeguard to which DT is already subject.

<sup>342</sup> CWA Comments at 3-6.

<sup>343</sup> National Consumer League Comments at 1.

consummated, will generate significant public interest benefits.<sup>344</sup> The Applicants argue that acquisition of control of Powertel will permit VoiceStream to fill a major gap in its national PCS footprint. They claim that consumers will benefit from this significant expansion of the nationwide footprint for GSM subscribers, which will result in additional competition in the mobile voice market.<sup>345</sup>

124. We agree with the Applicants that the expansion of VoiceStream's network to the portion of the southeastern United States that Powertel—but not VoiceStream—reaches at present constitutes a clear, transaction-specific public interest benefit. A significant percentage of mobile phone users desire nationwide access, and those users will benefit from the expanded licensed area to be created by combining VoiceStream and Powertel.

## VII. CONCLUSIONS

### A. Section 310(b)(4)

125. In response to the petition filed by the Applicants seeking a Commission determination that the levels of alien and foreign government ownership resulting from the proposed transactions would be consistent with the public interest, we have examined, as required by the *Foreign Participation Order*, whether the proposed foreign government ownership would pose a high risk of harm to competition in the U.S. market and have concluded that it would not. We therefore decline to impose conditions related to DT's conduct in the German market, as requested by some commenters. We also have accorded deference to the expertise of the Executive Branch regarding national security and law enforcement concerns and will condition grant of the DT Transfer Applications on compliance with the DT-VoiceStream/DOJ/FBI Agreement.

### B. Sections 214 and 310(d)

126. Based upon our section 310(b)(4) analysis and our reviews under sections 214(a) and 310(d) of the Act, we find that the Applicants are legally and otherwise qualified to hold the licenses at issue. We determine that the proposed merger will likely not result in harm to competition in any relevant market and will likely yield tangible public interest benefits to U.S. consumers. We conclude, therefore, that the transfers serve the public interest, convenience and necessity and decline to designate the DT Transfer Applications for hearing.

## VIII. RELATED PETITIONS

127. We also consider in this proceeding three petitions for declaratory ruling under section 310(b)(4) of the Act, and one petition for declaratory ruling under sections 310(b)(4) and 310(d) of the Act, from entities in which VoiceStream currently holds indirect, non-controlling interests (the Related

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<sup>344</sup> VoiceStream Powertel Application at 2-3.

<sup>345</sup> *Id.*

Petitions).<sup>346</sup> On February 1, 2001, the Bureaus issued a public notice to announce that the petitions were accepted for filing, and to establish a pleading cycle to permit interested parties an opportunity to comment on the petitions.<sup>347</sup> In response to the *Declaratory Ruling Public Notice* no comments were filed. As discussed above, under section 310(b)(4), we determine whether the public interest would be served by allowing these common carrier licensees to have indirect foreign ownership that exceeds 25 percent.<sup>348</sup>

128. We find no reason that the foreign ownership attributable to DT would raise concerns with respect to the Related Petitions different from those addressed in this order with respect to DT generally. Therefore, consistent with our findings with respect to the proposed acquisition by DT of VoiceStream Powertel in general, we conclude pursuant to section 310(b)(4) that the public interest is served by allowing the proposed levels of indirect foreign ownership requested in the Related Petitions. Each petition is discussed individually below.

#### A. CIVS IV and CIVS V

129. On October 13, 2000, Cook Inlet/VS GSM IV PCS, LLC (CIVS IV) and Cook Inlet/VS GSM V PCS, LLC (CIVS V) filed a Petition for Declaratory Ruling under Section 310(b)(4) of the Act stating that it is in the public interest to permit an indirect ownership interest of up to 49.9 percent in CIVS IV and CIVS V by DT. On April 4, 2001 CIVS IV and CIVS V filed an amendment to their Petition requesting that the Commission extend its section 310(b)(4) ruling in this proceeding to allow CIVS IV and CIVS V to exercise their right to call additional capital from VoiceStream up to the point where VoiceStream would have an 85 percent equity stake in CIVS IV and V.<sup>349</sup> CIVS IV and CIVS V each are

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<sup>346</sup> As discussed *infra* at para. 135, in addition to the petition under section 310(b)(4) of the Act filed by Iowa Wireless Services Holding Corporation (Iowa Wireless), VoiceStream and DT, with the licensee's consent, also have filed an application for the transfer of control of VoiceStream's limited partnership interest in Iowa Wireless to DT. See ULS File No. 0000315934.

<sup>347</sup> See Declaratory Ruling Public Notice, *supra* note 3. The petition filed on October 13, 2000 by the CIVS entities was withdrawn as moot on April 4, 2001 as a result of VoiceStream's acquisition of a controlling interest in these entities. See Withdrawal Letter from Jonathan D. Blake, Christine E. Enemark, and Rachel C. Welch, Counsel for Cook Inlet Region, Inc., Transferor of the CIVS entities to Magalie Roman Salas, Secretary, Federal Communications Commission, IB Docket No. 00-187 (filed Apr. 4, 2001). On April 12, 2001, the Applicants amended their Petition for Declaratory Ruling under section 310(b)(4) to include the CIVS entities as newly-acquired wholly-owned subsidiaries of VoiceStream. See VoiceStream DT Amendment to Petition for Declaratory Ruling (filed Apr. 12, 2001).

<sup>348</sup> 47 U.S.C. Section 310(b)(4); see also *Foreign Participation Order*, 12 FCC Rcd at 23935, para. 97.

<sup>349</sup> See Amendment Letter from Jonathan D. Blake, Christine E. Enemark, and Rachel C. Welch, Counsel for CIVS IV, CIVS V, BCN Communications, L.L.C. and CIVS IV License Sub I, LLC to Magalie Roman Salas, Secretary, Federal Communications Commission, IB Docket No. 00-187 (filed Apr. 4, 2001). CIVS IV and CIVS V also amended their petition to cover a new wholly-owned subsidiary of CIVS IV, BCN Communications, L.L.C. *Id.* An earlier amendment to the petition added wholly-owned subsidiary CIVS IV License Sub I, LLC. See Declaratory Ruling Public Notice, *supra* note 3 at 2 n.5. As wholly-owned subsidiaries of CIVS IV, these entities would have the same attributable indirect foreign ownership as CIVS IV.

Delaware limited liability companies.<sup>350</sup> CIVS IV is a wholly-owned, direct subsidiary of Cook Inlet/VS GSM IV PCS Holdings, LLC; CIVS V is a wholly-owned, direct subsidiary of Cook Inlet/VS GSM V PCS Holdings, LLC. Each of the CIVS IV Holdings and CIVS V Holdings has two members. Cook Inlet Mobile Corporation (CIMC) holds a 50.1 percent membership interest in and is the sole manager of CIVS IV Holdings; Cook Inlet Wireless, Inc. (CIWC) holds a 50.1 percent membership interest in and is the sole manager of CIVS V Holdings. CIMC and CIWC each are wholly-owned, direct subsidiaries of Cook Inlet Region, Inc., an Alaska Native Regional Corporation organized pursuant to the Alaska Native Claims Settlement Act. Omnipoint Investment, LLC, a wholly-owned subsidiary of VoiceStream, holds a 49.9 percent membership interest in each of CIVS IV Holdings and CIVS V Holdings.

130. In the event that DT acquires VoiceStream as contemplated, CIVS IV and CIVS V require Commission approval for the resulting indirect foreign ownership of CIVS IV and CIVS V attributable to DT.<sup>351</sup> We received no comments in response to the Public Notice of CIVS IV and CIVS V petition for a declaratory ruling.

131. Our grant of this petition allows the following foreign ownership: CIVS IV and CIVS V are authorized to be indirectly owned up to 85 percent by DT and DT's German shareholders. CIVS IV and CIVS V would need additional Commission authority under section 310(b)(4) before DT or DT's German shareholders could increase investment above the authorized levels. Foreign entities other than DT or DT's German shareholders may acquire as much as 25 percent aggregated indirect ownership in each of CIVS IV and CIVS V. Any such ownership in excess of 25 percent will require additional Commission authority.

#### **B. Wireless Alliance, L.L.C.**

132. On October 16, 2000, Wireless Alliance, L.L.C. (Wireless Alliance) filed a Petition for Declaratory Ruling under Section 310(b)(4) of the Act (Wireless Alliance Petition) stating that it is in the public interest to permit an indirect ownership interest of up to 30 percent in Wireless Alliance by DT. Wireless Alliance is a Delaware corporation owned and controlled 70 percent by Rural Cellular Corporation, a Minnesota corporation, and 30 percent owned by APT Minneapolis, Inc., a wholly-owned subsidiary of VoiceStream.<sup>352</sup>

133. In the event that DT acquires VoiceStream as contemplated, Wireless Alliance requires Commission approval for the resulting indirect foreign ownership of Wireless Alliance attributable to DT. We received no comments in response to the Public Notice of Wireless Alliance's petition for a declaratory ruling.

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<sup>350</sup> Because CIVS IV and CIVS V hold, or are intended to hold, entrepreneurs' block PCS licenses, they are structured to comply with the Commission's entrepreneurial eligibility rules. See 47 C.F.R. §§ 1.2110, 24.709, 24.720.

<sup>351</sup> See *VoiceStream/Omnipoint Order*, 15 FCC Rcd at 3347-50, paras. 13-20; *VoiceStream/Aerial Order*, 15 FCC Rcd at 10094-96, paras. 10-16.

<sup>352</sup> Wireless Alliance Petition at 2.

134. Our grant of this petition allows the following foreign ownership: Wireless Alliance is authorized to be indirectly owned up to 30 percent by DT and DT's German shareholders. Wireless Alliance would need additional Commission authority under section 310(b)(4) before DT or DT's German shareholders could increase investment above this authorized level. Foreign entities other than DT or DT's German shareholders may acquire as much as 25 percent aggregated indirect ownership in Wireless Alliance. Any such ownership in excess of 25 percent will require additional Commission authority.

### C. Iowa Wireless

135. On January 5, 2001, Iowa Wireless filed a Petition for Declaratory Ruling under sections 310(b)(4) and 310(d) (Iowa Wireless Petition) of the Act stating that it (1) is in the public interest to permit an indirect ownership interest of up to 38 percent in Iowa Wireless by DT and (2) based on the particular provisions of the Iowa Wireless organizational documents, the transfer to DT of VoiceStream's 38 percent limited partnership interest in Iowa Wireless either does not constitute a transfer of control of Iowa Wireless, or in the alternative, constitutes only a *pro forma* transfer of control of Iowa Wireless. Subsequently, on March 9, 2001, VoiceStream and DT, with the consent of Iowa Wireless, submitted an application for the transfer of control of VoiceStream's limited partnership interest in Iowa Wireless from VoiceStream to DT and asked that the application be subject to the processing procedures for substantive transfers of control.<sup>353</sup> The Applicants state that they seek to resolve "any question regarding the appropriate manner in which this application should be processed under the Commission's rules."<sup>354</sup> Accordingly, we find that the Applicants have rendered moot the need for a declaratory ruling under section 310(d) of the Act, and do not address the issue further. Instead, we limit our analysis of the Iowa Wireless Petition to the ruling requested under section 310(b)(4) of the Act.

136. *Section 310(b)(4)*. Iowa Wireless is a Delaware corporation, wholly-owned by IWS-LP, which in turn is comprised of a general partner, INS Wireless, Inc., an Iowa corporation, which holds a 62 percent general partnership interest, and a limited partner, VoiceStream PCS I Iowa Corporation, an indirect wholly-owned subsidiary of VoiceStream, which holds a 38 percent limited partnership interest.<sup>355</sup>

137. In the event that DT acquires VoiceStream as contemplated, Iowa Wireless requires Commission approval for the resulting indirect foreign ownership of Iowa Wireless attributable to DT. We received no comments in response to the Public Notice of Iowa Wireless' petition for a declaratory ruling.

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<sup>353</sup> See ULS File No. 0000315934. This application appeared as accepted for filing on March 21, 2001. See *Wireless Telecommunications Bureau Assignment of Authorization and Transfer of Control Applications Accepted for Filing*, Public Notice, Report No. 810 (Mar. 21, 2001). Disposition of this application is not addressed in this order.

<sup>354</sup> See ULS File No. 0000315934, Amendment at 1. See also Public Notice Report No. 810 (Mar. 21, 2001). This application will be processed independently from this proceeding taking into consideration the determinations made herein.

<sup>355</sup> Iowa Wireless Petition at 2.

138. Our grant of this petition allows the following foreign ownership: Iowa Wireless is authorized to be indirectly owned up to 38 percent by DT and DT's German shareholders. Iowa Wireless would need additional Commission authority under section 310(b)(4) before DT or DT's German shareholders could increase investment above this authorized level. Foreign entities other than DT or DT's German shareholders may acquire as much as 25 percent aggregated indirect ownership in Iowa Wireless. Any such ownership in excess of 25 percent will require additional Commission authority.

#### **D. Eliska Wireless Ventures**

139. On January 24, 2001, Eliska Wireless Ventures License Subsidiary I, L.L.C. (Eliska License Sub) filed a Petition for Declaratory Ruling under Section 310(b)(4) (Eliska License Sub Petition) of the Act stating that it is in the public interest to permit an indirect ownership interest of 49.9 percent equity in Eliska License Sub by DT. Eliska License Sub is a limited liability corporation formed under the laws of the state of Delaware. It is a wholly-owned subsidiary of Eliska Wireless Ventures I, Inc., a Delaware corporation which in turn is wholly-owned by EWV Holding Company, Inc., a Delaware corporation.

140. Powertel owns 49.9 percent of the equity and holds 24.95 percent of the voting rights in Eliska. In the event that DT acquires Powertel as contemplated, Eliska requires Commission approval for the resulting indirect foreign ownership of Eliska attributable to DT. We received no comments in response to the Public Notice of Eliska's petition for a declaratory ruling.

141. The International Bureau previously authorized Eliska to be indirectly owned up to 35.99 percent by any one of the following foreign entities: Sonera Holding BV, Sonera Corporation, and Sonera Ltd.<sup>356</sup> We stated that Eliska would need additional Commission authority under section 310(b)(4) before any of these Sonera entities could increase investment above this authorized level. Additional authority also would be required before any other foreign entity or entities acquire, in the aggregate, a greater-than-twenty five-percent indirect interest in Eliska.<sup>357</sup>

142. Our grant of this petition allows the following foreign ownership in addition to that previously authorized with respect to the Sonera entities: Eliska is authorized to be indirectly owned up to 49.9 percent by DT and DT's German shareholders. Eliska would need additional Commission authority under section 310(b)(4) before DT or DT's German shareholders could increase investment above this authorized level. Foreign entities other than the Sonera entities, DT, and DT's German shareholders may

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<sup>356</sup> See *DiGiPH PCS, Inc. and Eliska Wireless Ventures License Subsidiary I, L.L.C.*, Memorandum Opinion and Order, 15 FCC Rcd 24501 (2000). The assignment of the DiGiPH licenses to Eliska License Sub was consummated on January 31, 2001. As a result, Eliska Wireless Investors I, L.P., an Alabama limited partnership, holds a 60 percent voting and 20 percent equity interest. Powertel, a Delaware corporation, holds a 24.95 percent voting and 49.9 percent equity interest. Sonera Holding B.V., a company organized under the laws of the Netherlands, hold a 15.05 percent voting and 30.1 percent equity interest. Petitioners anticipate that Sonera's ownership interest in Powertel will result in Sonera's direct and indirect equity interest in EWV Holding Company Inc. totaling 35.99 percent. See Eliska License Sub Petition at 2.

<sup>357</sup> *Foreign Participation Order* 12 FCC Rcd at 23941, para. 114.

acquire as much as 25 percent aggregated indirect ownership in Eliska. Any such ownership in excess of 25 percent will require additional Commission authority.

## **IX. ORDERING CLAUSES**

143. Accordingly, having reviewed the applications, the petitions and the record in this matter, IT IS ORDERED, pursuant to sections 4(i) and (j), 214(a) and (c), 309, and 310(b) and (d) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i) and (j), 214(a) and (c), 309, and 310(b) and (d), that the applications filed by VoiceStream and Powertel for authority to transfer control of licenses and authorizations to DT, and the petitions for declaratory ruling filed by VoiceStream and Powertel in the above-captioned proceeding ARE GRANTED, to the extent specified in this order and subject to the conditions specified below.

144. IT IS FURTHER ORDERED that, pursuant to section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, this authorization to VoiceStream and Powertel to transfer control of their international section 214 authorizations to DT is subject to the condition that said section 214 authorizations shall be subject to rules governing dominant carriers set forth in section 63.10 of the Commission's rules, 47 C.F.R §63.10, on the U.S.–Germany, U.S.–Hungary, U.S.–Slovakia, and U.S.–Croatia routes.

145. IT IS FURTHER ORDERED that the above grant shall include authority for DT to acquire control of: (a) any authorization issued to VoiceStream's and Powertel's subsidiaries during the Commission's consideration of the transfer of control applications or the period required for consummation of the transaction following approval; (b) construction permits held by such licensees that mature into licensees after closing; and (c) applications filed by such licensees and that are pending at the time of consummation of the proposed transfer of control.

146. IT IS FURTHER ORDERED that, pursuant to sections 4(i) and (j), 214(a) and (c), 309 and 310(b) and (d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and (j), 214(a) and (c), 309, 310(b) and (d), that the Petition to Adopt Conditions to Authorization and Licenses filed by the Department of Justice and the Federal Bureau of Investigation, on January 25, 2001, IS GRANTED, and that the authorizations and licenses related thereto which are to be assigned or transferred as a result of this Order are subject to compliance with provisions of the Agreement between VoiceStream and DT on the one hand, and the Department of Justice and the Federal Bureau of Investigation on the other, effective on the date when the DT mergers with VoiceStream and Powertel have closed, which Agreement is designed to address the national security, law enforcement, and public safety concerns of the Department of Justice and the Federal Bureau of Investigation regarding the authority granted herein, is fully binding upon VoiceStream and DT and those subsidiaries, successors and assigns of both companies that provide telecommunications services within the United States. Nothing in the Agreement is intended to limit any obligation imposed by Federal law or regulation including, but not limited to, 47 U.S.C. §§ 222(a) and (c)(1) and the Commission's implementing regulations.

147. IT IS FURTHER ORDERED that the petitions for declaratory ruling filed by CIVS IV and CIVS V; Wireless Alliance; Iowa Wireless; and Eliska Wireless Ventures ARE GRANTED to the extent specified in the order; accordingly these entities are authorized to accept indirect foreign ownership in excess of the 25-percent benchmark of section 310(b)(4) of the Communications Act of 1934, as amended, to the extent specified in this Order.



148. IT IS FURTHER ORDERED pursuant to sections 4(i) and (j), 214(a) and (c), 309, and 310(b) and (d) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i) and (j), 214(a) and (c), 309, and 310(b) and (d), that the application filed by Powertel to transfer control of licenses and authorizations to VoiceStream in the above captioned proceeding IS GRANTED, in the alternative, if the proposed merger between DT and VoiceStream, as described herein, is not consummated.

149. IT IS FURTHER ORDERED that, pursuant to section 4(i) and (j), 214(a), 214(c), 309, 310(b) and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 4(i) and (j), 214(a) and (c), 309, 310(b) and (d), the Petition of WITCO to deny the applications of VoiceStream and DT for transfer of control is DENIED for the reasons stated herein.

150. IT IS FURTHER ORDERED that this Memorandum Opinion and Order SHALL BE EFFECTIVE upon release. Petitions for reconsideration under section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, may be filed within thirty days of the date of public notice of this order.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary

**APPENDIX A: Commenters and Filings****Petitions for Declaratory Ruling Filed by: (5)**

1. Cook Inlet/VS GSM IV PCS, LLC
2. Cook Inlet/VS GSM V PCS , LLC
3. Eliska Wireless Ventures License Subsidiary I, L.L.C.
4. Iowa Wireless Services Holding Corporation
5. Wireless Alliance, L.L.C.

**Reply Comments Filed by: (6)**

1. Callahan Associates International LLC
2. European Telecommunications Network Operators
3. European Union Delegation of the European Commission
4. Novaxess B.V.
5. Organization for International Investment
6. VoiceStream Wireless Corporation, et al

**Petitions to Deny Filed by: (1)**

1. Jordan-Soldier Valley Telephone Co. d/b/a/ WITCO\*

**Comments Filed by: (21)**

1. Alliance for Public Technology
2. Broadnet Wireless Broadband Networks
3. Communications Workers of America
4. Computer & Communications Industry Association
5. Federal Bureau of Investigation, et al.
6. Gary C. Hufbauer and Edward M. Graham
7. Global TeleSystems, Inc.
8. KKF.net AG
9. National Consumers League
10. NetCologne GmbH
11. Novaxess B.V.
12. Organization for International Investment
13. QS Communications AG
14. Robert J. Stankey, Jr.
15. Securities Industry Association
16. Siemens Corporation
17. Stan Kugell
18. The Honorable Ernest F. Hollings
19. The Honorable Michael Kantor
20. United States Chamber of Commerce
21. UTStarcom

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\* This Petition to Deny was originally filed in the *VoiceStream/CIRI* proceeding, *In re Applications of Cook Inlet Region, Inc. and VoiceStream Wireless Corporation*, WT Docket No. 00-207, Order, 15 Rcd 24691 (Wir. Tel. Bur. 2000).

## APPENDIX B: DT-VoiceStream/DOJ/FBI Agreement

## AGREEMENT

This AGREEMENT is made as of the date of the last signature affixed hereto, by and between: DEUTSCHE TELEKOM AG, VOICESTREAM WIRELESS CORPORATION ("VoiceStream Wireless"), and VOICESTREAM WIRELESS HOLDING CORPORATION ("VoiceStream Holdings") (VoiceStream Wireless and VoiceStream Holdings, and their subsidiaries, are collectively referred to as "VoiceStream") on the one hand, and THE FEDERAL BUREAU OF INVESTIGATION ("FBI") and THE U.S. DEPARTMENT OF JUSTICE ("DOJ") on the other, (referred to individually as a "Party" and collectively as the "Parties").

## RECITALS

WHEREAS, U.S. communication systems are essential to the ability of the U.S. government to fulfill its responsibilities to the public to preserve the national security of the United States, to enforce the laws, and to maintain the safety of the public;

WHEREAS, the U.S. government has an obligation to the public to ensure that U.S. communications and related information are secure in order to protect the privacy of U.S. persons and to enforce the laws of the United States;

WHEREAS, it is critical to the well being of the nation and its citizens to maintain the viability, integrity, and security of the communication system of the United States (*see, e.g.*, Presidential Decision Directive 63 on Critical Infrastructure Protection);

WHEREAS, protection of Classified, Controlled Unclassified, and Sensitive Information is also critical to U.S. national security;

WHEREAS, Deutsche Telekom AG, VoiceStream Wireless, and Powertel, Inc. ("Powertel") have filed (and/or will file) with the Federal Communications Commission ("FCC") applications under Sections 214 and 310(d) of the Communications Act of 1934, as amended (the "Act"), seeking FCC consent to the transfer of control to Deutsche Telekom AG of the interests of VoiceStream Wireless and Powertel and their subsidiaries in certain authorizations and licenses, and in connection therewith have also filed with the FCC petitions pursuant to Section 310(b)(4) of the Act for declaratory rulings that Deutsche Telekom AG's 100% indirect foreign ownership of the interests of VoiceStream Wireless and Powertel and their subsidiaries in wireless licenses is in the public interest, see International Bureau ("IB") Docket No. 00187 (Lead Application for licenses and authorizations controlled by VoiceStream Wireless, VoiceStream PCS I License L.L.C., File Number 0000211827; Lead Application for licenses and authorizations controlled by Powertel, Powertel Kentucky Licenses, Inc., File Number 0000214432);

WHEREAS, Deutsche Telekom AG is also requesting authority to acquire control of (1) any application or authorization issued to VoiceStream's subsidiaries or Powertel's subsidiaries during the FCC's consideration of the transfer of control and the period required for

consummation of the transactions described in the above paragraph following approval (*see, e.g.*, Public Notice, DA 00-2251 at 2 n.6 (rel. Oct. 11, 2000); Application for Transfer of Control and Petition for Declaratory Ruling, In re VoiceStream Wireless, at 44-45 n.136, IB Docket No. 00-187 (filed Sept. 19, 2000) (listing pending applications)), (2) construction permits held by such licensees that mature into licenses after closing and (3) applications that are filed after the date of these applications and that are pending at the time of consummation;

WHEREAS, Deutsche Telekom AG is a corporation organized and existing under the laws of the Federal Republic of Germany;

WHEREAS, Deutsche Telekom AG represents that the German government owned approximately 60% of the equity in Deutsche Telekom AG as of December 20, 2000, and that the German government's interest will decline to approximately 45% following the closing of Deutsche Telekom AG's mergers with VoiceStream Wireless and Powertel;

WHEREAS, the Parties are aware that the Foreign Policy and Security Advisor of the Federal Chancellor of Germany, stated in a letter dated 22 September 2000, to the Assistant to the President for National Security Affairs for the United States that "the German Government is fully committed to the full privatization of Deutsche Telekom and to the objective of reducing its direct stake not just to 25% but to zero," and the Economic Minister stated in a letter dated 5 September 2000, that "the German Government will continue to pursue its privatization policy and to reduce its stake in Deutsche Telekom steadily but cautiously, that is, in a manner which is consistent with the demand of the capital markets." Deutsche Telekom AG and VoiceStream have no knowledge that the intention of the German government is other than as stated in the letters;

WHEREAS, the transfers of control that are the subjects of the applications in IB Docket No. 00187 require prior consent by the FCC, and such consent and the grant of related requested declaratory rulings may be made subject to conditions relating to national security, law enforcement, and public safety, and Deutsche Telekom AG, VoiceStream Wireless and VoiceStream Holdings have each agreed to enter into this Agreement with the FBI and the DOJ to address issues raised by the FBI and the DOJ, and to request that the FCC condition the authorizations and licenses granted by the FCC on their compliance with this Agreement;

WHEREAS, Deutsche Telekom AG has represented that it will not exercise the authorizations and licenses granted by the FCC in IB Docket No. 00187 prior to the date on which the Deutsche Telekom AG mergers with VoiceStream and Powertel have closed;

WHEREAS, on December 15, 2000, the Parties filed a petition with the FCC to defer action on the subject applications pending agreement among the Parties;

WHEREAS, by Executive Order 12661, the President, pursuant to Section 721 of the Defense Production Act, as amended, authorized the Committee on Foreign Investment in the United States ("CFTUS") to review, for national security purposes, foreign acquisitions of U.S. companies;

WHEREAS, Deutsche Telekom AG, VoiceStream, and Powertel intend to submit a voluntary notice with CFIUS of Deutsche Telekom AG's mergers with VoiceStream Holdings and Powertel, and Deutsche Telekom AG and VoiceStream have each agreed to enter into this Agreement to resolve any national security issues that the DOJ and the FBI might raise, including in the CFIUS review process, consistent with Section 7.3 below; and

WHEREAS, representatives of Deutsche Telekom AG and VoiceStream have met with representatives of the FBI and the DOJ to discuss issues raised by the FBI and the DOJ. In these meetings, Deutsche Telekom AG represented that (a) it has no present plans, and is aware of no present plans of any other entity, as a result of which DT will provide Domestic Communications through facilities located outside the United States (though the Parties recognize that DT may, for bona fide commercial reasons as provided in this Agreement, use such facilities), (b) no government has, as a direct or indirect shareholder of Deutsche Telekom AG, special voting or veto rights concerning the actions of Deutsche Telekom AG, and is aware of no plans the result of which would confer such rights to a government concerning the actions of DT, (c) no government has appointed more than two members of the Supervisory Board of Deutsche Telekom AG, nor has any foreign government appointed any members to the Management Board of Deutsche Telekom AG, and DT is aware of no plans to increase the number of such members appointed, and (d) the members of the Supervisory Board of Deutsche Telekom AG appointed by the German government have always voted in line with the majority of other shareholders and have never opposed a proposal of the Management Board or Supervisory Board of Deutsche Telekom AG. In these meetings, VoiceStream represented that it has no present plans, and is aware of no present plans of any other entity, as a result of which DT will provide, direct, control, supervise or manage Domestic Communications through facilities located outside the United States. In these meetings, Deutsche Telekom AG and VoiceStream represented that they have no present plans for VoiceStream or any successor entity to provide non-wireless telecommunications services;

NOW THEREFORE, the Parties are entering into this Agreement to address national security, law enforcement and public safety issues.

## ARTICLE 1: DEFINITION OF TERMS

As used in this Agreement:

1.1 "Call Associated Data" or "CAD" means any information related to a Domestic Communication or related to the sender or recipient of that Domestic Communication and includes without limitation subscriber identification, called party number, calling party number, start time, end time, call duration, feature invocation and deactivation, feature interaction, registration information, user location, diverted to number, conference party numbers, dual tone multifrequency (dial digit extraction), inband and outofband signaling, and party add, drop and hold.

1.2 "Classified Information" means any information that has been determined pursuant to Executive Order 12958, or any predecessor or successor order, or the Atomic Energy Act of 1954, or any statute that succeeds or amends the Atomic Energy Act, to require protection against unauthorized disclosure.

1.3 "Control" and "Controls" means the power, direct or indirect, whether or not exercised, and whether or not exercised or exercisable through the ownership of a majority or a dominant minority of the total outstanding voting securities of an entity, or by proxy voting, contractual arrangements, or other means, to determine, direct, or decide matters affecting an entity; in particular, but without limitation, to determine, direct, take, reach, or cause decisions regarding:

- (a) the sale, lease, mortgage, pledge, or other transfer of any or all of the principal assets of the entity, whether or not in the ordinary course of business;
- (b) the dissolution of the entity;
- (c) the closing and/or relocation of the production or research and development facilities of the entity;
- (d) the termination or nonfulfillment of contracts of the entity;
- (e) the amendment of the articles of incorporation or constituent agreement of the entity with respect to the matters described in Section 1.3(a) through (d); or
- (f) DT's obligations under this Agreement.

1.4 "Controlled Unclassified Information" means unclassified information, the export of which is controlled by the International Traffic in Arms Regulations (ITAR), 22 C.F.R. Chapter I, Subchapter M, or the Export Administration Regulations (EAR), 15 C.F.R., Chapter VII, Subchapter C.

1.5 "*De facto*" and "*de jure*" control have the meanings provided in 47 C.F.R. § 1.2110.

1.6 "Domestic Communications" means (i) Wire Communications or Electronic Communications (whether stored or not) from one U.S. location to another U.S. location and (ii) the U.S. portion of a Wire Communication or Electronic Communication (whether stored or not) that originates or terminates in the United States.

1.7 "Domestic Communications Infrastructure" means (a) the transmission and switching equipment (including software and upgrades) used by or on behalf of U.S. Subsidiaries to provide, process, direct, control, supervise or manage Domestic Communications, (b) facilities and equipment of U.S. Subsidiaries that are physically located in the United States and (c) the facilities used by U.S. Subsidiaries to control the equipment described in (a) above. Domestic

Communications Infrastructure does not include equipment or facilities used by service providers that are not U.S. Subsidiaries, and that are:

- (a) interconnecting communications providers or
- (b) providers of services or content that are
  - (i) accessible using the communications services of U.S. Subsidiaries, and
  - (ii) available in substantially similar form and on commercially reasonable terms through communications services of companies other than U.S. Subsidiaries.

1.8 "DT" means (a) Deutsche Telekom AG, (b) its U.S. Subsidiaries, and/or (c) all entities Controlled by Deutsche Telekom AG that also Control the U.S. Subsidiaries. If, after the date all the Parties have executed this Agreement, DT acquires or creates a U.S. Subsidiary, then that U.S. Subsidiary shall be included within the definition DT. If Deutsche Telekom AG, after the date all the Parties have executed this Agreement, acquires Control of any entity that also Controls a U.S. Subsidiary, then that entity shall be included within the definition of DT.

1.9 "Effective Date" means the date on which the Deutsche Telekom AG mergers with VoiceStream and Powertel have closed.

1.10 "Electronic Communication" has the meaning given it in 18 U.S.C. § 2510(12).

1.11 "Electronic Surveillance" means (a) the interception of wire, oral, or electronic communications as defined in 18 U.S.C. §§ 2510(1), (2), (4) and (12), respectively, and electronic surveillance as defined in 50 U.S.C. § 1801(f); (b) access to stored wire or electronic communications, as referred to in 18 U.S.C. § 2701 et seq.; (c) acquisition of dialing or signaling information through pen register or trap and trace devices or other devices or features capable of acquiring such information pursuant to law as defined in 18 U.S.C. § 3121 et seq. and 50 U.S.C. § 1841 et seq.; (d) acquisition of location related information concerning a service subscriber or facility; (e) preservation of any of the above information pursuant to 18 U.S.C. § 2703(f); and (f) including access to, or acquisition or interception of, or preservation of communications or information as described in (a) through (e) above and comparable State laws.

1.12 "Foreign" where used in this Agreement, whether capitalized or lower case, means non-U.S.

1.13 "Intercept" or "Intercepted" has the meaning defined in 18 U.S.C. § 2510(4).

1.14 "Lawful U.S. Process" means lawful U.S. federal, state or local Electronic Surveillance court orders or authorizations, and other orders, processes or authorizations for access to or disclosure of Domestic Communications, Call Associated Data, Transactional Data or Subscriber Information authorized by U.S. federal, state or local law.

1.15 "Party" and "Parties" have the meanings given them in the Preamble.

1.16 "*Pro forma* assignments or *pro forma* transfers of control" are transfers or assignments that do not "involve a substantial change in ownership or control" of the licenses as provided in 47 U.S.C. § 309(c)(2)(B).

1.17 "Sensitive Information" means unclassified information regarding (a) the persons or facilities that are the subjects of Lawful U.S. Process, (b) the identity of the government agency or agencies serving such Lawful U.S. Process, (c) the location or identity of the line, circuit, transmission path, or other facilities or equipment used to conduct Electronic Surveillance pursuant to Lawful U.S. Process, (d) the means of carrying out Electronic Surveillance pursuant to Lawful U.S. Process, (e) the type(s) of service, telephone number(s), records, communications, or facilities subjected to Lawful U.S. Process, and (f) other unclassified information designated in writing by an authorized official of a federal, state or local law enforcement agency or a U.S. intelligence agency as "Sensitive Information." DT may dispute pursuant to Article 4 whether information is Sensitive Information under subparagraph 1.14(f). Such information shall be treated as Sensitive Information unless and until the dispute is resolved in DT's favor.

1.18 "Subscriber Information" means information relating to subscribers of U.S. Subsidiaries of the type referred to and accessible subject to procedures specified in 18 U.S.C. § 2703(c) or (d) or 18 U.S.C. § 2709. Such information shall also be considered Subscriber Information when it is sought pursuant to the provisions of other Lawful U.S. Process.

1.19 "Transactional Data" means:

- (a) "call identifying information," as defined in 47 U.S.C. § 1001(2), including without limitation the telephone number or similar identifying designator associated with a Domestic Communication;
- (b) Internet address or similar identifying designator associated with a Domestic Communication;
- (c) the time, date, size, and duration of a Domestic Communication;
- (d) any information possessed by the provider of Domestic Communications relating specifically to the identity and physical address of the provider's subscriber, user, or account payer;
- (e) to the extent associated with such subscriber, user, or account payer, any information possessed by the Domestic Communications provider relating to all telephone numbers, Internet addresses, or similar identifying designators; the physical location of equipment, if known and if different from the location information provided under (f) below; types of services; length of service; fees; and usage, including billing records; and



(f) as to any mode of transmission (including mobile transmissions), and to the extent permitted by U.S. laws, any information indicating as closely as possible the physical location to or from which a Domestic Communication is transmitted.

The term does not include the content of any communication.

1.20 "United States" means the United States of America including all of its States, districts, territories, possessions, commonwealths, and the special maritime and territorial jurisdiction of the United States.

1.21 "U.S. Subsidiaries" means all those subsidiaries, divisions, departments, branches and other components of DT that provide Domestic Communications. If any subsidiary, division, department, branch or other component of DT provides Domestic Communications after the date that all the Parties execute this Agreement, then such subsidiary, division, department, branch or other component of DT shall be deemed to be a U.S. Subsidiary. If DT has or in the future obtains *de jure* or *de facto* control over a joint venture or other entity that provides Domestic Communications, then the joint venture or entity shall also be deemed to be a U.S. Subsidiary. The term U.S. Subsidiaries shall not include acquisitions by Deutsche Telekom AG in the United States after the date this Agreement is executed by all the Parties only if the DOJ or the FBI find that the terms of this Agreement are inadequate to address national security concerns presented by that acquisition and the necessary modifications to this Agreement cannot be reached pursuant to Section 9.11 below.

1.22 "Wire Communication" has the meaning given it in 18 U.S.C. § 2510(1).

1.23 Other capitalized terms used in this Agreement and not defined in this Article shall have the meanings assigned them elsewhere in this Agreement. The definitions in this Agreement are applicable to the singular as well as the plural forms of such terms and to the masculine as well as to the feminine and neuter genders of such term. Whenever the words "include," "includes," or "including" are used in this Agreement, they shall be deemed to be followed by the words "without limitation."

## **ARTICLE 2: FACILITIES, INFORMATION STORAGE AND ACCESS**

2.1 Except to the extent and under conditions concurred in by the FBI and the DOJ in writing:

(a) all Domestic Communications Infrastructure that is owned, operated, or controlled by VoiceStream shall at all times be located in the United States and will be directed, controlled, supervised and managed by VoiceStream; and

(b) all Domestic Communications Infrastructure not covered by Section 2.1(a) shall at all times be located in the United States and shall be directed, controlled, supervised and managed by a U.S. Subsidiary, except strictly for *bona fide* commercial reasons;

(c) all Domestic Communications that are carried by or through, in whole or in part, the Domestic Communications Infrastructure shall pass through a facility under the control of a U.S. Subsidiary and physically located in the United States, from which Electronic Surveillance can be conducted pursuant to Lawful U.S. Process. DT will provide technical or other assistance to facilitate such Electronic Surveillance.

2.2 DT shall take all practicable steps to configure its Domestic Communications Infrastructure to be capable of complying, and DT's employees in the United States will have unconstrained authority to comply, in an effective, efficient, and unimpeded fashion, with:

- (a) Lawful U.S. Process,
- (b) the orders of the President in the exercise of his/her authority under § 706 of the Communications Act of 1934, as amended, (47 U.S.C. § 606), and under § 302(e) of the Aviation Act of 1958 (49 U.S.C. § 40107(b)) and Executive Order 11161 (as amended by Executive Order 11382), and
- (c) National Security and Emergency Preparedness rules, regulations and orders issued pursuant to the Communications Act of 1934, as amended (47 U.S.C. § 151 *et seq.*).

2.3 U.S. Subsidiaries shall make available in the United States the following:

- (a) stored Domestic Communications, if such communications are stored by a U.S. Subsidiary (or any entity with which a U.S. Subsidiary has contracted or made other arrangements for data or communications processing or storage) for any reason;
- (b) any Wire Communications or Electronic Communications (including any other type of wire, voice or electronic communication not covered by the definitions of Wire Communication or Electronic Communication) received by, intended to be received by, or stored in the account of a customer or subscriber of a U.S. Subsidiary, if such communications are stored by a U.S. Subsidiary (or any entity with which a U.S. Subsidiary has contracted or made other arrangements for data or communications processing or storage) for any reason;

- (c) Transactional Data and Call Associated Data relating to Domestic Communications, if such data are stored by a U.S. Subsidiary (or any entity with which a U.S. Subsidiary has contracted or made other arrangements for data or communications processing or storage) for any reason;
- (d) Subscriber Information concerning customers or subscribers of a U.S. Subsidiary, if such information are stored by a U.S. Subsidiary (or any entity with which a U.S. Subsidiary has contracted or made other arrangements for data or communications processing or storage) for any reason; and
- (e) billing records relating to customers and subscribers of a U.S. Subsidiary for so long as such records are kept and at a minimum for as long as such records are required to be kept pursuant to applicable U.S. law or this Agreement.

2.4 U.S. Subsidiaries shall ensure that the data and communications described in Section 2.3(a) - (e) of this Agreement are stored in a manner not subject to mandatory destruction under any foreign laws, if such data and communications are stored by a U.S. Subsidiary (or any entity with which a U.S. Subsidiary has contracted or made other arrangements for data or communications processing or storage) for any reason. U.S. Subsidiaries shall ensure that the data and communications described in Section 2.3(a) - (e) of this Agreement shall not be stored by a U.S. Subsidiary (or any entity with which a U.S. Subsidiary has contracted with or made other arrangements for data or communications processing or storage) outside of the United States unless such storage is strictly for *bona fide* commercial reasons weighing in favor of storage outside the United States.

2.5 DT shall store for at least two years all billing records maintained by U.S. Subsidiaries for their customers and subscribers.

2.6 Upon a request made pursuant to 18 U.S.C. § 2703(f) by a governmental entity within the United States to preserve any information in the possession, custody, or control of DT that relates to (a) a customer or subscriber of a U.S. Subsidiary, or (b) any communication of such customer or subscriber described in (a) above, or (c) any Domestic Communication, DT shall store such preserved records or other evidence in the United States.

2.7 Nothing in this Agreement shall excuse DT from any obligation it may have to comply with U.S. legal requirements for the retention, preservation, or production of such information or data.

2.8 Except strictly for *bona fide* commercial reasons, DT shall not route a Domestic Communication outside the United States.

2.9 DT shall comply, with respect to Domestic Communications, with all applicable FCC rules and regulations governing access to and storage of Customer Proprietary Network Information ("CPNI"), as defined in 47 U.S.C. § 222(f)(1).

### ARTICLE 3: SECURITY

3.1 DT shall take all reasonable measures to prevent the use of or access to the Domestic Communications Infrastructure to conduct Electronic Surveillance in violation of any U.S. federal, state, or local laws or the terms of this Agreement. With regard to Domestic Communications Infrastructure under the control of DT, these measures shall take the form of detailed technical, organizational, personnel related policies and written procedures, necessary implementation plans, and physical security measures.

3.2 DT shall not, directly or indirectly, disclose or permit disclosure of, or provide access to Domestic Communications, Call Associated Data, Transactional Data, or Subscriber Information stored by DT in the United States to any person if the purpose of such access is to respond to the legal process or the request of or on behalf of a foreign government, identified representative, component or subdivision thereof without the express written consent of the DOJ or the authorization of a court of competent jurisdiction in the United States. Any such requests or submission of legal process described in this Section 3.2 of this Agreement shall be reported to the DOJ as soon as possible and in no event later than five business days after such request or legal process is received by and known to DT. DT shall take reasonable measures to ensure that it will learn of all such requests or submission of legal process described in this Section 3.2 of this Agreement.

3.3 DT shall not, directly or indirectly, disclose or permit disclosure of, or provide access to:

- (a) Classified or Sensitive Information, or
- (b) Subscriber Information, Transactional Data, Call Associated Data, or a copy of any Wire Communications or Electronic Communication intercepted or acquired pursuant to Lawful U.S. Process

to any foreign government, identified representative, component or subdivision thereof without satisfying all applicable U.S. federal, state and local legal requirements pertinent thereto, and obtaining the express written consent of the DOJ or the authorization of a court of competent jurisdiction in the United States. Any requests or any legal process submitted by a foreign government, an identified representative, a component or subdivision thereof to DT for the communications, data or information identified in this Section 3.3 of this Agreement that is maintained by DT shall be referred to the DOJ as soon as possible and in no event later than five business days after such request or legal process is received by and known to DT unless the disclosure of the request or legal process would be in violation of an order of a court of competent jurisdiction within the United States. DT shall take reasonable measures to ensure that it will learn of all such requests or submission of legal process described in this Section 3.3 of this Agreement.

3.4 At least every 3 months, DT shall notify DOJ in writing of legal process or requests by foreign nongovernmental entities for access to or disclosure of Domestic Communications carried by or through, in whole or in part, the Domestic Communications Infrastructure unless the disclosure of the legal process or request would be in violation of an order of a court of competent jurisdiction within the United States.

3.5 Within 60 days after the Effective Date, DT shall designate points of contact within the United States with the authority and responsibility for accepting and overseeing the carrying out of Lawful U.S. Process to conduct Electronic Surveillance of or relating to Domestic Communications carried by or through, in whole or in part, the Domestic Communications Infrastructure; or relating to customers or subscribers of U.S. Subsidiaries. The points of contact shall be assigned to DT security office(s) in the United States, shall be available 24 hours per day, 7 days per week and shall be responsible for accepting service and maintaining the security of Classified Information and any Lawful U.S. Process for Electronic Surveillance of or relating to Domestic Communications carried by or through, in whole or in part, the Domestic Communications Infrastructure, or relating to customers or subscribers of U.S. Subsidiaries, in accordance with the requirements of U.S. law. Promptly after designating such points of contact, DT shall notify the FBI and the DOJ in writing of the points of contact, and thereafter shall promptly notify the FBI and the DOJ of any change in such designation. The points of contact shall be resident U.S. citizens who are eligible for appropriate U.S. security clearances. DT shall cooperate with any request by a government entity within the United States that a background check and/or security clearance process be completed for a designated point of contact.

3.6 DT shall protect the confidentiality and security of all Lawful U.S. Process served upon it and the confidentiality and security of Classified Information and Sensitive Information in accordance with U.S. federal and state law or regulation.

3.7 DT shall, within security office(s) in the United States:

- (a) take appropriate measures to prevent unauthorized access to data or facilities that might contain Classified Information or Sensitive Information;
- (b) assign U.S. citizens, who meet high standards of trustworthiness for maintaining the confidentiality of Sensitive Information, to positions that handle or that regularly deal with information identifiable to such person as Sensitive Information;
- (c) upon request from the DOJ or FBI, provide the name, social security number and date of birth of each person who regularly handles or deals with Sensitive Information;
- (d) require that personnel handling Classified Information shall have been granted appropriate security clearances;

- (e) provide that the points of contact described in Section 3.5 of this Agreement shall have sufficient authority over any of DT's employees who may handle Classified Information or Sensitive Information to maintain the confidentiality and security of such information in accordance with applicable U.S. legal authority and the terms of this Agreement; and
- (f) maintain appropriately secure facilities (e.g., offices) for the handling and storage of any Classified Information and Sensitive Information.

3.8 DT shall instruct appropriate officials, employees, contractors, and agents as to their obligations under this Agreement, including the reporting requirements of Sections 5.6 and 5.7 of this Agreement, and shall issue periodic reminders to them of such obligations.

3.9 Nothing contained in this Agreement shall limit or affect the authority of a U.S. government agency to deny, limit or revoke DT's access to Classified, Controlled Unclassified, and Sensitive Information under that agency's jurisdiction.

#### ARTICLE 4: DISPUTES

4.1 The Parties shall use their best efforts to resolve any disagreements that may arise under this Agreement. Disagreements shall be addressed, in the first instance, at the staff level by the Parties' designated representatives. Any disagreement that has not been resolved at that level shall be submitted promptly to higher authorized officials, unless the FBI or the DOJ believes that important national interests can be protected, or DT believes that its paramount commercial interests can be resolved, only by resorting to the measures set forth in Section 4.2 of this Agreement. If, after meeting with higher authorized officials, any of the Parties determines that further negotiation would be fruitless, then that Party may resort to the remedies set forth in Section 4.2 of this Agreement. If resolution of a disagreement requires access to Classified Information, the Parties shall designate a person or persons possessing the appropriate security clearances for the purpose of resolving that disagreement.

4.2 Subject to Section 4.1 of this Agreement, if any of the Parties believes that any other of the Parties has breached or is about to breach this Agreement, that Party may bring an action against the other Party for appropriate judicial relief.

4.3 Deutsche Telekom AG agrees that the United States would suffer irreparable injury if for any reason DT failed to perform any of its significant obligations under this Agreement, and that monetary relief would not be an adequate remedy. Accordingly, Deutsche Telekom AG agrees that, in seeking to enforce this Agreement against DT, the FBI and the DOJ shall be entitled, in addition to any other remedy available at law or equity, to specific performance and injunctive or other equitable relief.

4.4 The availability of any civil remedy under this Agreement shall not prejudice the exercise of any other civil remedy under this Agreement or under any provision of law, nor shall any action taken by a Party in the exercise of any remedy be considered a waiver by that Party of any other rights or remedies. The failure of any Party to insist on strict performance of any of the provisions of this Agreement, or to exercise any right they grant, shall not be construed as a relinquishment or future waiver, rather, the provision or right shall continue in full force. No waiver by any Party of any provision or right shall be valid unless it is in writing and signed by the Party.

4.5 DT agrees that, to the extent that it or any of its property (including FCC licenses and authorizations and intangible property) is or becomes entitled at any time to any immunity on the ground of sovereignty or otherwise based upon a status as an agency or instrumentality of government from any legal action, suit or proceeding or from setoff or counterclaim relating to this Agreement from the jurisdiction of any competent court or the FCC, from service of process, from attachment prior to judgment, from attachment in aid of execution of a judgment from execution pursuant to a judgment or arbitral award, or from any other legal process in any jurisdiction, it, for itself and its property expressly, irrevocably and unconditionally waives, and agrees not to plead or claim, any such immunity with respect to matters arising with respect to this Agreement or the obligations herein (including any obligation for the payment of money) in any proceeding brought by a U.S. federal, state or local governmental authority. DT agrees that the waiver in this provision is irrevocable and is not subject to withdrawal in any jurisdiction or under any statute, including the Foreign Sovereign Immunities Act, 28 U.S.C. Section 1602 *et seq.* The foregoing waiver shall constitute a present waiver of immunity at any time any action is initiated by a U.S. federal, state or local governmental authority against DT with respect to compliance with this Agreement.

4.6 It is agreed by and between the Parties that a civil action among the Parties for judicial relief with respect to any dispute or matter whatsoever arising under, in connection with, or incident to, this Agreement shall be brought, if at all, in the United States District Court for the District of Columbia.

4.7 Nothing in this Agreement shall limit or affect the right of a U.S. government agency to:

- (a) seek revocation by the FCC of any license, permit, or other authorization granted or given by the FCC to DT, or any other sanction by the FCC against DT, or
- (b) seek civil sanctions for any violation by DT of any U.S. law or regulation or term of this Agreement, or
- (c) pursue criminal sanctions against DT, or any director, officer, employee, representative, or agent of DT, or against any other person or entity, for violations of the criminal laws of the United States.

4.8 This Article 4, and the obligations imposed and rights conferred herein, shall be effective upon the execution of this Agreement by all the Parties.

#### ARTICLE 5: AUDITING, REPORTING, NOTICE AND LIMITS

5.1 If DT makes any filing with the FCC or any other governmental agency relating to the *de jure* or *de facto* control of DT, except for filings with the FCC for assignments or transfers of control to any U.S. subsidiary of DT that are *pro forma*, DT shall promptly provide to the FBI and the DOJ written notice and copies of such filing. This Section 5.1 is effective upon execution of this Agreement by all the Parties.

5.2 Effective upon execution of this Agreement by all the Parties, DT shall provide to the FBI and the DOJ written notice within 14 days after learning that any foreign government, any foreign government controlled entity, or any other foreign entity obtains or seeks to obtain an ownership interest or increase its existing ownership interest (direct or indirect) in DT to a level such that the foreign government or entity is itself entitled to (i) Board of Directors representation (including representation on the Management Board or Supervisory Board), (ii) special voting or veto rights, or (iii) minority shareholder rights under applicable Articles of Incorporation, bylaws (or equivalent documents), or other constituent agreements; or in the case of a foreign entity, obtains Control of DT. To the extent known to DT, such notice shall, at a minimum, (a) identify the foreign government or foreign entity, (b) quantify the amount of ownership interest in DT that the entity holds or will likely hold, and (c) include a description of the transaction that has resulted in or through which the foreign government or foreign entity seeks to obtain Control of DT.

5.3 U.S. Subsidiaries shall provide to the FBI and the DOJ 30 days advance notice if a U.S. Subsidiary (or any entity with which a U.S. Subsidiary has contracted or made other arrangements for data or communications processing or storage) plans to store a Domestic Communication, Transactional Data, Call Associated Data, or Subscriber Information outside of the United States. Such notice shall, at a minimum, (a) include a description of the type of information to be stored outside the United States, (b) identify the custodian of the information if other than a U.S. Subsidiary, (c) identify the location where the information is to be located, and (d) identify the factors considered in deciding to store the information outside of the United States (see Section 2.4 of this Agreement). This Section 5.3 is effective 30 days after execution of this Agreement by all the Parties.

5.4 DT has entered into or may enter into joint ventures under which the joint venture or entity may provide Domestic Communications. To the extent DT does not have *de facto* or *de jure* control over such joint venture or entity, DT shall in good faith endeavor to have such entity comply with this Agreement as if it were a U.S. Subsidiary and shall consult with the FBI or the DOJ about the activities of such entity. This Section 5.4 is effective upon execution of this Agreement by all the Parties. Nothing in this Section 5.4 does nor shall it be construed to relieve DT of its obligations under Sections 2.3 and 2.4 of this Agreement.



5.5 If DT outsources functions covered by this Agreement to a third party that is not a U.S. Subsidiary, DT shall take reasonable steps to ensure that those third parties comply with the applicable terms of this Agreement. Such steps shall include: (a) DT shall include in the contracts of any such third parties written provisions requiring that such third parties comply with all applicable terms of the Agreement or take other reasonable, good-faith measures to ensure that such third parties are aware of, agree to, and are bound to comply with the applicable obligations of this Agreement, (b) if DT learns that the outsourcing third party or the outsourcing third party's employee has violated an applicable provision of this Agreement, DT will notify the DOJ and the FBI promptly, and (c) with consultation and, as appropriate, cooperation with the DOJ and the FBI, DT will take reasonable steps necessary to rectify promptly the situation, which steps may (among others) include terminating the arrangement with the outsourcing third party, including after notice and opportunity for cure, and/or initiating and pursuing litigation or other remedies at law and equity.

5.6 If any member of a DT Board of Directors (including a Management Board or Supervisory Board) or member of the senior management of DT (including the Chief Executive Officer, President, General Counsel, Chief Technical Officer, Chief Financial Officer or other senior officer) learns that any foreign government:

(a) plans to participate or has participated in any aspect of the day-to-day management of DT in such a way that interferes with or impedes the performance by DT of its duties and obligations under the terms of this Agreement, or interferes with or impedes the exercise by DT of its rights under the Agreement, or

(b) plans to exercise or has exercised, as a direct or indirect shareholder of DT or its subsidiaries, any Control of DT in such a way that interferes with or impedes the performance by DT of its duties and obligations under the terms of this Agreement, or interferes with or impedes the exercise by DT of its rights under the terms of this Agreement, or foreseeably concerns DT's obligations under this Agreement,

then such member shall promptly cause to be notified the Vice President for Legal Affairs or other designated representative of a U.S. Subsidiary located in the United States, who in turn, shall promptly notify the FBI and the DOJ in writing of the timing and the nature of the government's plans and/or actions. This Section 5.6 is effective upon the execution of this Agreement by all the Parties.

5.7 DT shall take practicable steps to ensure that, if any DT official, employee, contractor or agent acquires any information that reasonably indicates: (a) a breach of this Agreement; (b) Electronic Surveillance conducted in violation of federal, state or local law or regulation; (c) access to or disclosure of CPNI or Subscriber Information in violation of federal, state or local law or regulation (except for violations of FCC regulations relating to improper use of CPNI); or (d) improper access to or disclosure of Classified Information or Sensitive Information, then DT

shall notify the FBI and the DOJ in the same manner as specified in Section 5.6 of this Agreement. This report shall be made promptly and in any event no later than 10 calendar days after DT acquired information indicating a matter described in 5.7(a)-(d) of this Agreement. DT shall lawfully cooperate in investigating the matters described in 5.6 and 5.7(a)-(d) of this Agreement. DT need not report information where disclosure of such information would be in violation of an order of a court of competent jurisdiction in the United States. This Section 5.7 is effective 30 days after execution of this Agreement by all the Parties.

5.8 In response to reasonable requests made by the FBI or the DOJ, DT shall provide access to information concerning technical, physical, management, or other security measures and other reasonably available information needed by the DOJ or the FBI to assess compliance with the then-effective terms of this Agreement. This Section 5.8 is effective upon execution of this Agreement by all the Parties.

5.9 Upon reasonable notice and during reasonable hours, the FBI and the DOJ may visit and inspect any part of DT's Domestic Communications Infrastructure and security offices for the purpose of verifying compliance with the terms of this Agreement. DT may have appropriate DT employees accompany U.S. government representatives throughout any such inspection.

5.10 Upon reasonable notice from the FBI or the DOJ, DT will make available for interview officers or employees of DT, and will seek to require contractors to make available appropriate personnel located in the United States who are in a position to provide information to verify compliance with the then-effective terms of this Agreement. This Section 5.10 is effective upon execution of this Agreement by all the Parties.

5.11 On or before the last day of January of each year, a designated senior corporate officer of Deutsche Telekom AG shall submit to the FBI and the DOJ a report assessing DT's compliance with the terms of this Agreement for the preceding calendar year. The report shall include:

- (a) a copy of the policies and procedures adopted to comply with this Agreement;
- (b) a summary of the changes, if any, to the policies or procedures, and the reasons for those changes;
- (c) a summary of any known acts of noncompliance with the terms of this Agreement, whether inadvertent or intentional, with a discussion of what steps have been or will be taken to prevent such acts from occurring in the future; and
- (d) identification of any other issues that, to DT's knowledge, will or reasonably could affect the effectiveness of or compliance with this Agreement.

5.12 Effective upon execution of this Agreement by all the Parties, all notices and other communications given or made relating to this Agreement, such as a proposed modification, shall be in writing and shall be deemed to have been duly given or made as of the date of receipt and shall be (a) delivered personally, or (b) sent by facsimile, (c) sent by documented overnight courier service, or (d) sent by registered or certified mail, postage prepaid, addressed to the Parties' designated representatives at the addresses shown below, or to such other representatives at such others addresses as the Parties may designate in accordance with this Section:

Department of Justice  
Assistant Attorney General  
Criminal Division  
Main Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

Federal Bureau of Investigation  
General Counsel  
935 Pennsylvania Avenue, NW  
Washington, DC 20535

With a copy to:  
The Assistant Director  
National Security Division

Deutsche Telekom AG  
P.O. Box 2000  
53105 Bonn, Germany  
Attention: Wolfgang Kopf (OWP 10)

With a copy to:  
Wilmer, Cutler & Pickering  
2445 M Street N.W.  
Washington, D.C. 20037-1420  
Attention: Sheila C. Cheston

VoiceStream Wireless Holding Corporation and  
VoiceStream Wireless Corporation  
3650 131st Avenue  
Bellevue, Washington 98006  
Attention: Vice President of Legal Affairs

With a copy to:  
Morrison & Foerster LLP  
2000 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006-1888

Attention: Doane F. Kiechel

O'Melveny & Myers LLP  
555 13th St. NW, Suite 500 West  
Washington, D.C. 20004-1109  
Attention: Stephen Harburg

#### ARTICLE 6: FREEDOM OF INFORMATION ACT

6.1 The FBI and the DOJ shall take all reasonable measures to protect from public disclosure all information submitted by DT to the FBI or the DOJ in connection with this Agreement and clearly marked with the legend providing "Confidential; Subject to protection under 5 U.S.C. § 553(b); Not to be released without notice to DT," or similar designation. Such markings shall signify that it is the position of DT that the information so marked constitutes "trade secrets" and/or "commercial or financial information obtained from a person and privileged or confidential," or otherwise warrants protection within the meaning of 5 U.S.C. § 552(b). If a request is made under 5 U.S.C. § 552(a)(3) for information so marked, and disclosure of any information (including disclosure in redacted form) is contemplated, the FBI or the DOJ, as appropriate, shall notify Deutsche Telekom AG, pursuant to Section 5.13 of this Agreement, or notify the submitting DT entity of the intended disclosure as provided by Executive Order 12600, 52 Fed. Reg. 23781 (June 25, 1987). If DT objects to the intended disclosure and its objections are not sustained, the FBI or the DOJ, as appropriate, shall notify the submitting entity and Deutsche Telekom AG of its intention to release (as provided by Section 5 of E.O. 12600) not later than 10 business days prior to disclosure of the challenged information. This Section 6.1 is effective upon execution of this Agreement by all the Parties.

6.2 The DOJ and the FBI acknowledge that officers and employees of the United States and of any department or agency thereof are subject to liability under 18 U.S.C. § 1905 for unlawful disclosure of information provided to them by the other Parties to this Agreement.

6.3 Nothing in this Agreement shall prevent the FBI or the DOJ from lawfully disseminating information as appropriate to seek enforcement of this Agreement, provided that the FBI and the DOJ take all reasonable measures to protect from public disclosure the information marked as described in Section 6.1.

#### ARTICLE 7: FCC CONDITION AND CFIUS

7.1 Upon the execution of this Agreement by all the Parties, the FBI and the DOJ shall promptly notify the FCC that, provided the FCC adopts a condition substantially the same as set forth in Exhibit A attached hereto (the "Condition to FCC Licenses"), the FBI and the DOJ have no objection to the FCC's consent to the proposed transfers of control of the authorizations currently held by VoiceStream Wireless, Powertel, and their subsidiaries that are the subject of the application filed with the FCC in IB Docket No. 00187, or the authority Deutsche Telekom AG seeks to hold 100% indirect control of those licenses.

7.2 DT agrees that in its applications or petitions to the FCC for licensing or other authority filed with the FCC after the Effective Date, except with respect to *pro forma* assignments or *pro forma* transfers of control, it shall request that the FCC condition the grant of such licensing or other authority on DT's compliance with the terms of this Agreement. The FBI and the DOJ reserve the right to seek additional or different terms that would, consistent with the public interest, address any threat to their ability to enforce the laws, preserve the national security and protect the public safety raised by the transactions underlying such applications or petitions.

7.3 Provided that the FCC adopts the Condition to FCC Licenses, the Attorney General shall not make any objection to the CFIUS or the President concerning the grant of the proposed transfers of control of the authorizations and licenses currently held by VoiceStream Wireless and Powertel that are the subject of the applications filed with the FCC in IB Docket No. 00187, the authority Deutsche Telekom AG seeks to hold 100% indirect control of those licenses and authorizations, or Deutsche Telekom AG's mergers with VoiceStream and Powertel. This commitment, however, does not extend to any objection the Attorney General may wish to raise with the CFIUS or the President in the event that (a) DT fails to comply with the terms of this Agreement, (b) the Attorney General learns that the representations of Deutsche Telekom AG, VoiceStream or Powertel made to the DOJ, the FBI, or the FCC above are materially untrue or incomplete, (c) there is a material increase in the authority of a foreign entity to exercise Control of DT, or (d) there is any other material change in the circumstances associated with the transactions at issue.

#### **ARTICLE 8: PREVIOUS AGREEMENTS WITH VOICESTREAM**

8.1 VoiceStream remains bound to comply with its obligations imposed pursuant to the agreement entered between VoiceStream and the FBI and the DOJ dated January 26, 2000, and such agreement remains in full force and effect until, and shall not terminate or be suspended before, all the conditions set forth in Section 8.2 below are met.

8.2 The agreement between VoiceStream and the FBI and the DOJ dated January 26, 2000 shall terminate upon, and only upon, the happening of all the following events: (a) the Parties, and each of them, execute this Agreement, (b) the FCC adopts the Condition to FCC Licenses and (c) Deutsche Telekom AG, VoiceStream Wireless, and all other necessary parties successfully and fully consummate the proposed transactions between VoiceStream and Deutsche Telekom, and their respective subsidiaries that underlay the applications for authority of Deutsche Telekom AG and VoiceStream Wireless filed with the FCC in IB Docket No. 00187 under sections 214 and 310(d) of the Act.

#### **ARTICLE 9: OTHER**

9.1 Deutsche Telekom AG represents that it has and shall continue to have throughout the term of this Agreement the full right to enter into this Agreement and perform its obligations

(including those to DT) hereunder and that this Agreement is a legal, valid, and binding obligation of Deutsche Telekom AG and DT enforceable in accordance with its terms.

9.2 VoiceStream Wireless represents that it has and shall continue to have throughout the term of this Agreement the full right to enter into this Agreement and perform its obligations hereunder and that this Agreement is a legal, valid, and binding obligation of VoiceStream Wireless enforceable in accordance with its terms.

9.3 VoiceStream Holdings represents that it has and shall continue to have throughout the term of this Agreement the full right to enter into this Agreement and perform its obligations hereunder and that this Agreement is a legal, valid, and binding obligation of VoiceStream Holdings enforceable in accordance with its terms.

9.4 The Article headings and numbering in this Agreement are inserted for convenience only and shall not affect the meaning or interpretation of the terms of this Agreement.

9.5 Nothing in this Agreement is intended to limit or constitute a waiver of (a) any obligation imposed by any U.S. federal, state or local laws on DT or VoiceStream, (b) any enforcement authority available under any U.S. or state laws, (c) the sovereign immunity of the United States, or (d) any authority the U.S. government may possess over the activities of DT or VoiceStream or facilities of DT or VoiceStream located within or outside the United States.

9.6 All references in this Agreement to statutory provisions shall include any future amendments to such statutory provisions.

9.7 Nothing in this Agreement is intended to confer or does confer any rights on any person other than the Parties and any U.S. governmental authorities entitled to effect Electronic Surveillance pursuant to Lawful U.S. Process.

9.8 None of the terms of this Agreement shall apply to (a) any services that a DT entity other than VoiceStream provides in the United States pursuant to Section 214 of the Communications Act of 1934, or (b) any noncommunications services provided by DT unrelated to the provision of Domestic Communications.

9.9 This Agreement may only be modified by written agreement signed by all of the Parties. The FBI and the DOJ agree to consider in good faith and promptly possible modifications to this Agreement if Deutsche Telekom AG or VoiceStream believes that the respective obligations imposed on them under this Agreement are substantially more restrictive than those imposed on other U.S. and foreign licensed service providers in like circumstances in order to protect U.S. national security, law enforcement, and public safety concerns. Any substantial modification to this Agreement shall be reported to the FCC within 30 days after approval in writing by the Parties.

9.10 The DOJ and the FBI agree to negotiate in good faith and promptly with respect to any request by DT for relief from application of specific provisions of this Agreement to future DT

activities or services if those provisions become unduly burdensome to DT or adversely affect DT's competitive position, or the German government's interest in DT decreases substantially.

9.11 If, as provided in Section 1.21, the DOJ or the FBI finds that the terms of this Agreement are inadequate to address national security concerns presented by an acquisition by Deutsche Telekom AG in the United States after the date that all the Parties have executed this Agreement, DT will negotiate in good faith to modify this Agreement to address those concerns.

9.12 If any portion of this Agreement is declared invalid by a U.S. court of competent jurisdiction, this Agreement shall be construed as if such portion had never existed, unless such construction would constitute a substantial deviation from the Parties' intent as reflected in this Agreement.

9.13 This Agreement may be executed in one or more counterparts, including by facsimile, each of which shall together constitute one and the same instrument.

9.14 This Agreement shall inure to the benefit of, and shall be binding upon, the Parties, and their respective successors and assigns.

9.15 This Article 9, and the obligations imposed and the rights conferred herein, is effective upon the execution of this Agreement by all the Parties.

9.16 Except as otherwise specifically provided in the provisions of this Agreement, the obligations imposed and rights conferred by this Agreement shall take effect upon the Effective Date. This Agreement shall be null and void in its entirety if Deutsche Telekom AG, VoiceStream and Powertel, their respective subsidiaries and all other necessary parties fail to successfully and fully consummate the proposed transactions among them that underlay the applications for authority of Deutsche Telekom AG and VoiceStream Wireless filed with the FCC in IB Docket No. 00-187 under sections 214 and 310(d) of the Act, and the transfers of control of the FCC licenses and authorizations for which FCC consent has been sought in IB Docket No. 00-187 are not effected.

9.17 Nothing in this Agreement is intended to or is to be interpreted to require the Parties to violate any applicable U.S. law.

This Agreement is executed on behalf of the Parties:

**Deutsche Telekom AG**

Date: \_\_\_\_\_

By: \_\_\_\_\_

Printed Name: Hans-Willi Hefekaeuser

Title: Senior Executive Vice-President

**VoiceStream Wireless Corporation**

Date: 12/29/00

By: 12/29/00

Printed Name: John W. Stanton

Title: Chairman and Chief Executive Officer

**VoiceStream Wireless Holding Corporation**

Date: 12/29/00

By: 12/29/00

Printed Name: John W. Stanton

Title: Chairman and Chief Executive Officer

**Federal Bureau of Investigation**

Date: 1-10-01

By: Larry R. Parkinson

Printed Name: Larry R. Parkinson

Title: General Counsel

**United States Department of Justice**

Date: 1-12-01

By: Eric Holder

Printed Name: Eric Holder

Title: Deputy Attorney General



This Agreement is executed on behalf of the Parties:

Deutsche Telekom AG

Date: 04/01/01

Printed Name: Hans-Willi Hefekaucer  
Title: Senior Executive Vice-President

By: 

VoiceStream Wireless Corporation

Date: \_\_\_\_\_

By: \_\_\_\_\_

Printed Name: John W. Stanton  
Title: Chairman and Chief Executive Officer

VoiceStream Wireless Holding Corporation

Date: \_\_\_\_\_

By: \_\_\_\_\_

Printed Name: John W. Stanton  
Title: Chairman and Chief Executive Officer

Federal Bureau of Investigation

Date: \_\_\_\_\_

By: \_\_\_\_\_

Printed Name: Larry R. Parkinson  
Title: General Counsel

United States Department of Justice

Date: \_\_\_\_\_

By: \_\_\_\_\_

Printed Name: Eric Holder  
Title: Deputy Attorney General

**EXHIBIT A****CONDITION TO FCC LICENSES**

IT IS FURTHER ORDERED, that the authorizations and the licenses related thereto are subject to compliance with the provisions of the Agreement attached hereto between DEUTSCHE TELEKOM AG, VoiceStream Wireless Corporation, VoiceStream Wireless Holding Corporation on the one hand, and the Department of Justice (the "DOJ") and the Federal Bureau of Investigation (the "FBI") on the other, dated \_\_\_\_\_, 2001, which Agreement is designed to address national security, law enforcement, and public safety issues of the FBI and the DOJ regarding the authority granted herein. Nothing in this Agreement is intended to limit any obligation imposed by Federal law or regulation including, but not limited to, 47 U.S.C. § 222(a) and (c)(1) and the FCC's implementing regulations.

**STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH  
CONCURRING IN PART, DISSENTING IN PART**

*Re: In re Applications of Voicestream Wireless Corporation, Powertel Inc. Transferors and Deutsche Telekom AG, Transferee, et al, IB Docket No. 00-187 (rel. April 27, 2001).*

I join today's decision to grant the requested license transfers from Voicestream and Powertel to Deutsche Telekom (DT). Although I regret that our decision has taken so long, at least in this case (unlike so many license transfers before it) the delay was not attributable to closed-door negotiations about so-called "merger conditions." Instead today the Commission squarely addresses a legal issue of first impression: the scope and meaning of Sections 310(a) and (b)(4) as applied to a proposed licensee controlled by a holding company in which a foreign government has a significant ownership interest. Unfortunately the Commission in prior decisions had sent unclear signals about the application of Section 310 to this situation. It is my hope that today's decision – built on the plain language of the statute – will clear up any lingering ambiguity about our interpretation. Moreover, I am pleased that today's decision properly places the burden on the Commission, not the applicants, to show that the "public interest will be served by the refusal or revocation of such license" transfer under Section 310(b)(4).<sup>1</sup> In my view, this is a heavy burden that has not been met in this case.

Let me also note my profound appreciation for the insights of Senator Hollings in this proceeding. Senator Hollings invested substantial effort in providing detailed comments to the Commission. His comments helped the Commission focus on the details of the Communications Act generally and Section 310 in particular. Thanks to Senator Hollings, the Commission avoided many mistakes in this proceeding, including an erroneous interpretation that the World Trade Organization agreements, rather than Section 310 of the Communications Act, governed the Commission's review of this license transfer. The Commission's final determinations--both those that are consistent with the insights of Senator Hollings and those that are not--have been substantially strengthened as a result of the reflection required to appreciate fully his comments. Senator Hollings has reminded us to remain faithful to the law, and that is what this Commission has attempted to do.

I also wish to applaud a subtle shift in the Commission's approach to license transfers that is reflected in today's item. In the past, the Commission has assumed the role of "competition police" in license transfers. In these cases, the Commission would wander off into various "market analyses" to re-plow ground already spade by the Justice Department. All of these contortions were rationalized based on a statutory interpretation that permitted the Commission to engage in any form of review on an ad hoc basis. I am heartened to see that today's item does not engage in market analysis for market analysis sake. Instead, the

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<sup>1</sup> I also note that the proper placement of this burden on the Commission is only one of many possible reforms to our Section 310 process that will more faithfully fulfill our statutory obligations. I hope that future Commissions will re-examine our overall approach to these issues. See Sidak, Gregory J., *Foreign Investment in American Telecommunications* (University of Chicago Press 1997).

Order solely responds to concerns raised by the commenters. While I would have preferred an outright rejection of the relevance of these antitrust-like concerns to the narrow issue of these license transfers, I am nonetheless heartened by this change in direction.

Regardless of the positive aspects of today's Order, I must dissent from the Commission's decision to once again yield to the Justice Department and FBI by incorporating their side agreements with the parties into this Order. As I have stated on numerous prior occasions, the national security concerns raised by the Justice Department and FBI are serious and should be addressed; however, our license transfer process should not be hijacked for their cause.<sup>2</sup> A proper approach to our process creates an opportunity for Executive Branch agencies to be heard and their views considered in our license transfer proceedings.<sup>3</sup> However, to the extent that the Executive Branch has significant concerns about the national security implications of a given transaction, Congress has created an Executive Branch review process with strict timeframes to assess all such transactions throughout the economy.<sup>4</sup> There is no statutory basis for singling out telecommunications companies for special, and less favorable, treatment. Congress has explicitly set the respective roles of the Executive Branch and the Commission in these transactions, and we should abide by them.

Rather than adopting this approach, the Commission has unwisely allowed its license transfer authority to be used by the Executive Branch to negotiate "voluntary agreements" that respond to national security concerns. These agreements are not very voluntary; without such a deal, the FCC has refused to grant the license transfers.<sup>5</sup> Applicants, now aware of how this process works, often go to the Executive Branch early in the license transfer process and surrender to their demands. However, that only eliminates the delay, it

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<sup>2</sup> See Separate Statement of Commissioner Harold Furchtgott-Roth, In the Matter of Applications of SatCom Systems, Inc., TMI Communications and Company, L.P. and SatCom Systems Inc., 14 FCC Rcd 20798 (1999); see also AT&T Corp., British Telecommunications, plc, VLT Co. L.L.C., Violet License Co. LLC, and TNV [Bahamas] Limited Applications for Grant of Section 214 Authority, Modification of Authorizations and Assignment of Licenses in Connection with the Proposed Joint Venture Between AT&T Corp. and British Telecommunications, plc, 14 FCC Rcd 19140 (1999).

<sup>3</sup> See 47 U.S.C. §§ 214 and 310; see Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Service in the United States, Report and Order, 12 FCC Rcd 24094, ¶ 179 (1997) ("DISCO II"); Ironically, "we emphasize[d] . . . that we expect national security, law enforcement, foreign policy and trade policy concerns to be raised in very rare circumstances. Contrary to the fears of some commenters, the scope of the concerns that the Executive Branch will raise in the context [of transfers] . . . is narrow and well-defined." *Id.* at ¶ 180.

<sup>4</sup> 50 U.S.C. § 2170(a)-(k). Pursuant to Section 2170(a), the President authorized the Committee on Foreign Investment in the United States ("CFIUS") to review foreign acquisitions of U.S. companies for national security purposes. If it is determined that an investigation is necessary, the investigation must commence no later than 30 days after the President's receipt of written notification of the transaction in question, and the investigation must be completed no later than 45 days after such a determination is made. The President must make an investigation in any case in which an entity controlled by a foreign government seeks to engage in a transaction that could affect national security, which is subject to the time limitations stated above. The President must announce a decision to take action to suspend or prohibit any transaction no later than 15 days after an investigation is completed.

<sup>5</sup> These filings have often delayed transactions' closing by months.

does not address the ongoing problem of enforcement. Because the license transfers are conditioned on compliance with these side agreements, the Commission by definition becomes responsible for ensuring compliance.<sup>6</sup> In the end, I do not believe the Commission's proper role is to promulgate or enforce Executive Branch side agreements with licensees. I hope future Commission's will re-examine this process with a critical eye as well.

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<sup>6</sup> By conditioning these transfers on compliance with the side agreements, it also seems to be the case that whenever the side agreement needs to be amended or altered, the Executive Branch and the parties are obligated to come to the FCC for approval. This prospect alone would seem to be a sufficient deterrent to the Executive Branch to use the licensing process to achieve their goals.